95-152

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No. _____

In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD*,

Respondents.

On Petition For A Writ Of Certiorari To The Third District Court Of Appeal Of The State Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), precludes an action for defamation by a candidate for the U.S. House of Representatives who received bomb and death threats as a result of statements by a periodical circulating in the Cuban American community of South Florida that branded her as a "representative of [Fidel] Castro's interests in the United States" and a "Castroite," when such statements were false and were based upon numerous false statements characterized as facts, and where historically such statements have led to the death and injury of others.

2. Whether the state courts below are correct in their conclusion that defamatory statements characterized as opinion, but explicitly supported by false facts, are not actionable under the First Amendment simply because the underlying false facts used to support the defamatory statement, when construed in isolation, may not be independently defamatory.

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PETITION FOR A WRIT OF CERTIORARI

Magda Montiel Davis respectfully petitions for a Writ of Certiorari to review the judgment of the Third District Court of Appeal of the State of Florida.

OPINIONS BELOW

The judgment of the Court of Appeal of Florida, Third District (Appendix ["App."], *infra,* 1), which affirmed *per curiam,* without opinion, the judgment of the trial court is reported at 653 So.2d 516 (Fla. 3rd DCA

1995). The judgment and opinion of the trial court (App., *infra*, 2-6) is unreported.

JURISDICTION

The Court of Appeal entered its judgment on April 26, 1995. App., *infra*, 1. Article V, § 3(b)(3) of the Florida Constitution prohibits the Supreme Court of Florida to review *per curiam* decisions of District Courts of Appeal rendered without opinion. *St. Paul Title Ins. Corp. v. Davis*, 392 So.2d 1304 (Fla. 1980); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment has been made applicable to the states through the due process clause of the Fourteenth Amendment. *See, e.g., Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

STATEMENT OF THE CASE

Magda Montiel Davis, the Petitioner, filed this lawsuit in October, 1992 as a result of statements that the Respondents published in their periodical, *La Verdad*, on September 24 and October 1, 1992. The Respondents accused Ms. Davis, then a candidate for the United States House of Representatives, of being "a representative of Castro's interests in the United States" and a "Castroite."

The Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, dismissed with prejudice Ms. Davis' Amended Complaint on November 16, 1994, citing this Court's opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). App., *infra*, 2-6. The Third District Court of Appeal of Florida affirmed the judgment of the Circuit Court, without opinion, again citing *Milkovich*. App., *infra*, 1. Ms. Davis then timely filed this Petition for a Writ of Certiorari.

I. Factual Background to the Congressional Candidate's Libel Suit

Magda Montiel Davis, a Cuban American, announced her candidacy for the United States House of Representatives on July 13, 1992. Her opponent was the incumbent, Ileana Ros-Lehtinen, also a Cuban American. Prior to that time, Ms. Davis had been a practicing attorney in Florida since 1978.

Beginning in mid-September, 1992, articles and front-page headlines concerning Ms. Davis' candidacy began to appear in the Respondents' periodical, *La Verdad* ("*The*

Truth"). The September 24 and October 1, 1992 publications of this periodical adduced numerous false assertions to support their accusations that Ms. Davis is Fidel Castro's agent.

The front-page headline of the October 1, 1992 publication proclaims, "*Our Legislator Ileana Ros-Lehtinen Takes on the Defender of Castro: More Evidence of Montiel Davis' Links to the Tyrant Castro.*" App., *infra*, 21, 23. The "evidence" to which the headline referred was the fact that Ms. Davis' husband had once represented the National Bank of Cuba and Cubaexport as local counsel in a lawsuit filed thirteen years prior to the article's publication. App., *infra*, 24. Ms. Davis' husband was not then, and never has been, Castro's attorney. Nonetheless, the article falsely indicated that Castro is currently his, as well as Ms. Davis', client by explaining that if Ms. Davis took "Ileana's seat" in Congress, the "opportunities to serve their client Fidel Castro would multiply even more." App., *infra*, 24. "It is understood, therefore, that those who represent the interests of Castro in exile, such as Montiel Davis and her husband [ ], are anxious to replace her." App., *infra*, 26. The October 1, 1992 publication further stated that "we continue receiving reports of [Ms. Davis' husband's] links to the [Cuban] government," and "as we receive these documents and we verify them, we publish them for the information of the voters." App., *infra*, 23-24.

The September 24, 1992 publication is similar. The front-page headline states, "Castroite ['Castrista'] Democrat Challenging our Congresswoman Ileana Ros." App., *infra*, 30, 32. The article's first five paragraphs explicitly

attempt to prove that Ms. Davis and her husband represent and "respond to" Castro's interests. App., *infra*, 32. For example, the article stated that Francisco Aruca, a client of Ms. Davis' husband, is Castro's "most visible agent in Miami." App., *infra*, 33. This statement, too, is false in that Mr. Aruca has never been an agent of Castro.

The September 24, 1992 article further stated that 1989 court papers described another of her husband's clients, Marazul Charters, Inc., as a "foreign corporation." App., *infra*, 32. The article accounted for this by stating that the company is "registered as foreign, because it belongs to Castro's government." App., *infra*, 33. Respondents repeated this assertion the next week in the first paragraph of the October 1 article. App., *infra*, 23. In fact, Marazul Charters was described in court papers as a "foreign corporation" because it had been incorporated in New York, not Florida.

Moreover, the September 24 publication of *La Verdad* tried to show that Ms. Davis and her husband are united in their service of Fidel Castro, his regime and his "agents" Francisco Aruca and Marazul Charters. It asserts four times that Ms. Davis and her husband are law partners, which they never have been. App., *infra*, 32-33. On September 30, 1992, Ms. Davis' then attorney served a retraction demand on Respondents referencing those statements, among others. App., *infra*, 18. Yet, the next day Respondents republished the same false facts, adverting to the previous week's publication in which "[w]e made the clarification then that this Montiel Davis, a lawyer who was born in Cuba, is a member with her husband of the latter's law firm." App., *infra*, 23.

Respondents concluded from all of the above falsehoods that Ms. Davis and her husband's "law firm":

> was chosen by the *government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul, a firm registered as foreign, because it belongs to Castro's government.*
>
> It is to be supposed that Castro was not going to trust his money and the legal defense of his most visible agent in Miami, [Francisco] *Pancho Aruca, to a law firm which was his enemy politically or one which he could not fully trust.*

App., *infra*, 32-33 (emphasis in original).

It is not true that Castro chose "the couple's law firm" (App., *infra*, 32), to represent Marazul Charters, or even that Ms. Davis and her husband are now, or have ever been, members of the same law firm. Castro, in fact, never chose any law firm to represent Marazul Charters. The clear message of the article was that a candidate for the U.S. House of Representatives was an agent for the Cuban Government.

Immediately after *La Verdad* published its articles, Ms. Davis began to suffer the adverse consequences of the accusations therein. Those consequences included everything from public name-calling to bomb and death threats. App., *infra*, 12. She was subjected to contempt, repudiation and humiliation from close friends and complete strangers. App., *infra*, 12, 15-16. Her personal life and professional life were severely damaged. App., *infra*, 15-16.

II. Proceedings Below and How the Federal Question Was Presented

After serving retraction demands on the Respondents in conformance with Florida law that notified the Respondents that they would "be held personally responsible for any incitement to violence against Ms. Davis or her campaign that [their] article[s] may cause" (App., *infra*, 19), Ms. Davis sued the Respondents in October, 1992. Ms. Davis filed an Amended Complaint in March, 1994, alleging libel in two counts based on the statements and implications in *La Verdad*'s articles that Ms. Davis "represents Castro's interests in the United States" and is a "Castroite."

The Amended Complaint set out lengthy allegations pertaining to the repressive climate of political speech that obtains in South Florida on the issue of Castro's Cuba. It explained that, for over thirty years, Miami's Cuban community (which includes outlying suburban areas in Dade County) has been dominated by hard-liners who have been actively and demonstrably hostile to Fidel Castro's regime and to any perceived (whether accurate or not) supporters of it. App., *infra*, 8-12. Those hard-liners have manifested their dominance through acts of violence, examples of which include the execution of persons who negotiated for the release of political prisoners from Cuba; the attempted assassination of a local radio newscaster for a remark perceived as too soft on communism; twin bombings in 1990 of the Cuban Museum in Miami for the display of art work created by residents of Cuba; and death threats against the publisher and executives of *The Miami Herald* for their criticism of

the Cuban American National Foundation. App., *infra*, 9-11.[1]

The Amended Complaint further alleged that, given the climate of repression that these and other acts of violence have engendered in the Miami area, and the ensuing hypersensitivity to issues relating to Cuba and Castro, "to be denounced as a 'Castrista' [Castroite], or as Castro's representative, . . . *immediately* singles [out] a person as a Communist and Castro supporter and summons the hatred, violence, contempt and prejudice of the audience towards the individual singled out." App., *infra*, 12. That is what happened to Ms. Davis upon the Respondents' publication of the September 24 and October 1, 1992 articles in *La Verdad* and was the essence of the lawsuit.

The Respondents filed a motion to dismiss the amended complaint on April 27, 1994. Among other grounds of dismissal, the Respondents asserted that the statements and implications sued upon were not actionable under the First Amendment to the United States Constitution. The Respondents' memorandum in support of their motion to dismiss specifically relied upon this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Respondents also maintained that this Court's decisions in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988);

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[1] The repressive climate of political speech in South Florida on issues relating to Cuba has been well documented in, *inter alia*, Americas Watch/Fund for Free Expression, *Dangerous Dialogue: Attacks on Freedom of Expression in Miami's Cuban Exile Community*, Vol. 4, Issue 7, August, 1992, and in a follow-up report issued in 1994.

National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974); and *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970), supported dismissal of the amended complaint.

The Circuit Court heard oral argument on October 9, 1994. Without an evidentiary hearing, the court issued its Final Judgment of Dismissal on November 16, 1994, dismissing Ms. Davis' Amended Complaint with prejudice. App., *infra*, 2-6. The court held that the "statements sued upon are protected by the First Amendment as non-actionable expression constituting political opinion and judgments." App., *infra*, 2. The court reached this decision by applying *Milkovich*, which it stated "controls the disposition of this case." App., *infra*, 3.

Borrowing nearly verbatim from the Respondents' memorandum in support of their motion to dismiss, the court explained that "this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech," which included the *Bresler*, *Letter Carriers* and *Falwell* decisions. App., *infra*, 4.

On November 22, 1994, Ms. Davis filed a notice of appeal. After the parties submitted briefs and the Third District Court of Appeal heard oral argument, the court affirmed the judgment of the Circuit Court without opinion, citing *Milkovich*. App., *infra*, 1.

This timely Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. The Petition for a Writ of Certiorari Should Be Granted Because This Case Raises Significant Questions Regarding the Defamation of Persons Seeking Federal Office

A. The State Courts' Decisions Sanctioned Defamatory Statements Based on False Facts Against a Candidate for the United States Congress Which Resulted in Violent Assaults on the Candidate

The state court decisions below have expressly sanctioned the defamation, based on false facts, of a candidate for congressional office, which resulted in violent assaults on the candidate. If the state court decisions stand, candidates for federal public office would be subject to defamation and libel, leading to bomb and death threats, as here, without any redress for such defamation. The state court decisions, by protecting even defamatory statements based on false facts on the grounds that the defamatory statements themselves are not sufficiently "factual" or susceptible of verification to support an action for libel, permit any publisher who wishes to defame or libel a federal candidate or federal official to do so with impunity and employ any false facts of the publisher's choosing, as long as the publisher is careful to fabricate supporting facts that are not defamatory. The law expressed by the state courts below now permits defamation on the grounds that the speaker's defamatory statement is merely opinion, even if the "opinion" *is based upon untruths the speaker has fabricated specifically to make the defamatory statement more convincing to the reasonable reader.* Petitioner respectfully submits that this Court's jurisprudence will not bear this interpretation against

federal office seekers, particularly where it has resulted in violent assaults, and that the First Amendment does not require this result.

The Respondents' defamatory statements are actionable because they did not merely express objective interpretations of political positions that a federal candidate had espoused during her campaign, but were libelous statements explicitly based on verifiably false facts concerning that candidate. Respondents and the Courts below, however, analyzed the statements that Ms. Davis "is a representative of Castro's interests in the United States" and a "Castroite" as if those statements appeared in a vacuum unrelated to the context of the Respondents' false statements about Ms. Davis' purported relationship to Castro, and unrelated to their effect against one seeking federal office.

Consequently, the state courts below held the defamatory statements to be privileged under the First Amendment, notwithstanding the patent falsity of the facts supporting those libels and the harm occasioned to Ms. Davis and her congressional campaign thereby. But as *Milkovich* makes clear, a reasonable factfinder must assess the impact of the various statements in the articles, as well as the headlines, to determine whether the articles imply an assertion that is factually false and defamatory. *Milkovich*, 497 U.S. at 21; *see also id.* at 23-24 (BRENNAN, J., dissenting) (agreeing with the Court that "the 'statement' that the plaintiff must prove false under [*Philidelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986),] is not invariably the literal phrase published, but rather what a reasonable reader would have understood the author to have said"). Viewing the September 24 and October 1, 1992, *La Verdad* articles *in toto*, it is clear that the

Respondents sought to buttress their claim that Ms. Davis is Castro's representative or agent by presenting false "facts" to provide the basis for that accusation.

The September 24 article, for example, stated that Ms. Davis' husband had represented Francisco Aruca in a lawsuit, as well as his "foreign corporation," Marazul Charters. App., *infra*, 32. The article falsely stated that Aruca is an agent of Castro – "his most visible agent in Miami" – and that Marazul Charters was labeled in court papers as a "foreign corporation" because "it belongs to Castro's government," not because it was incorporated in another state. App., *infra*, 32. The article further stated falsely that Ms. Davis' husband's law firm was "chosen by the *government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul.*" App., *infra*, 32-33 (emphasis in original). The article ties all of this back to Ms. Davis by asserting that "Montiel Davis is a member of her husband's law firm" and "a partner and wife of a lawyer trusted by Fidel Castro." App., *infra*, 32-33. Neither statement has ever been true.

In addition, *La Verdad* tried to give the foregoing "facts" an air of authenticity, couching their carefully chosen rhetoric in the language of objective news reporting and investigatory reportage, implying that they culled the information from external sources. For example, the headline and title of the October 1, 1992 publication proclaimed "More Evidence of Montiel Davis' Links to the Tyrant Castro." App., *infra*, 21, 23. The same article stated that "we continue receiving reports of [Ms. Davis' husband's] links to the government of the tyrant who oppresses our country. And so as we receive these documents and we verify them, we publish them for the information of the

voters." App., *infra*, 23-24. This statement, above all, clearly implies verifiable facts underlying the Respondents' charge that Ms. Davis and her husband represent Castro's interests. "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining that" Ms. Davis was closely linked to Castro. *Milkovich*, 497 U.S. at 21. "Nor does the general tenor of the article negate this impression." *Id. La Verdad*'s defamatory statements are actionable since, in the context of the articles in which they appear, they assert, imply and rely on provably false "facts." *Id.* at 18-19, 21.

This case presents a factual situation which contrasts sharply to those in prior decisions of this Court in which the context in which injurious and defamatory speech was situated provided enough information to make it clear to the reasonable reader that the speech was *not* stating or implying *actual* facts about the allegedly injured parties, notwithstanding that the statements, if taken literally, may have been defamatory and false. *See Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Hustler Magazine v. Falwell*, 485 U.S. 876 (1988). Unlike the publications at issue in those cases, the *La Verdad* articles that defamed Ms. Davis presented false "facts" about the candidate in a deliberate effort to persuade voters and readers of the Respondents' periodicals that Ms. Davis is in league with Fidel Castro. Based on the representations of "fact" that the Respondents' articles laid out, a reasonable reader, knowing little else about Ms. Davis or her congressional campaign, would have interpreted those "facts" as indicating Ms. Davis' close association with Castro. Based on the immediate,

hostile, and violent reaction that the articles engendered, including bomb and death threats, many readers obviously did. *See* App., *infra*, 12, 15-16. To the extent that the decisions below relied upon analogies to *Bresler*, *Letter Carriers* and *Falwell*, they were thus erroneous because *La Verdad*'s defamatory statements could, and in fact did, convey to its readers that they stated *actual facts* about Ms. Davis. Here, as in *Milkovich*, "the [*La Verdad*] readers implicitly were told that only one conclusion was possible." *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 731 (2d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2942, 119 L.Ed.2d 567 (1992).

Even if defamation law before *Milkovich* was an imperfect remedy for "[t]he destruction that defamatory falsehood can bring," *Milkovich*, 497 U.S. at 22-23 (citing *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (STEWART, J., concurring)), the state courts' interpretation of *Milkovich* below would place much defamatory speech beyond *any* legal remedy. The Respondents have never seriously challenged the fact that the speech at issue in the *La Verdad* articles was defamatory of Ms. Davis and her congressional campaign. Even the trial judge who dismissed the case acknowledged that, in Miami, if a person is publicly identified as a Castroite, "he might be dead in three minutes." Transcript of Oral Argument at 8. Nor did the Respondents ever question the fact that Ms. Davis and her campaign were seriously damaged by their statements. Yet, incredibly, the state courts interpreted *Milkovich* to preclude Ms. Davis' action for defamation.

B. The Decisions of the State Courts Have Seriously Misinterpreted This Court's Decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and If Not Corrected, Will Render the Law of Defamation Meaningless Against Federal Office Seekers in This District

Prior decisions of this Court have sought to strike a balance between protection of the democratic values underlying the First Amendment and an individual's right to seek redress for defamation under state law. On one hand, this Court has protected the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964). Yet, this Court has also recognized that, "imperfect though it is, an action for damages is the only hope of vindication or redress the law gives to a man whose reputation has been falsely dishonored." *Rosenblatt*, 383 U.S. at 93 (STEWART, J., concurring) (cited in *Milkovich*, 497 U.S. at 23). The *Milkovich* case itself is nothing if not an explicit attempt to "hold[ ] the balance true," 497 U.S. at 23, and it shows that the scales are not invariably tipped in favor of uninhibited speech, even on issues of public concern.

As *Milkovich* explicitly recognized, this balance has adequately been struck by prior precedents of this Court. Most important in this regard are the "actual malice" standard of fault enunciated in *New York Times Co. v. Sullivan*, 376 U.S. at 279-80, and the proof-of-falsity requirement established in *Philadelphia Newspapers, Inc. v.*

Hepps, 475 U.S. 767, 777 (1986). *See Milkovich*, 497 U.S. at 14-16. The actual malice standard permits the press to be openly critical of public officials and candidates for office without being required to guarantee the truth of their assertions; a publisher's false and defamatory assertions are protected under the First Amendment as long as the publisher did not know of the falsity of its assertions, or was not reckless as to whether they were false or not. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974); *New York Times*, 376 U.S. at 279-80. Similarly, *Hepps* eliminates the common law presumption that defamatory speech is false when a plaintiff seeks damages against a media defendant for defamatory speech of public concern, placing the burden of proof of falsity upon the plaintiff. 475 U.S. at 776-77. To *Hepps*, *Milkovich* simply added the refinement that defamatory speech *implying* a provably false statement of fact is actionable, consistent with the First Amendment, even if it might conceivably be characterized as merely an "opinion." *Milkovich*, 497 U.S. at 21.

However, the Respondents in this case argued below, and the Third District Court of Appeal apparently agreed, that the Respondents' defamatory "opinions" that Ms. Davis "represents Castro's interests in the United States" and is a "Castroite" were not actionable under *Milkovich* because they did not themselves imply provably false facts, and the false facts upon which those "political judgments" were based were not themselves defamatory. The problem with this reasoning is that, in a situation like the one this case presents, this creates an artificial division between the defamatory "opinion" and the false statements upon which they are based. The state courts' view is antithetical to the recognition in *Milkovich* that

actionable defamations can arise by implication from the total context of a publication. *Id.* at 21. As this Court acknowledged in that case, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are *either incorrect or incomplete*, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications." *Id.* at 18-19 (emphasis added).

Surely, if it is true that a purported statement of opinion that implies a provably false assertion of fact is actionable, then it must also hold true that a purported statement of opinion explicitly based on provably false assertions of fact adduced for the express purpose of persuading a reasonable reader of the reasonableness of that opinion must also be actionable. At least one other court in construing *Milkovich* appears to have reached this result. *See Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 202, 130 L.Ed.2d 133 (1994) ("[S]tatements of opinion can be actionable if they imply provably false facts, or rely upon stated facts that are provably false."). The state court's misconstruction of *Milkovich*, if allowed to stand, would eviscerate the law of defamation and would deny federal officials and those seeking federal office protection from defamation leading to violent assault.

CONCLUSION

In sum, this Court should grant this Petition for a Writ of Certiorari to resolve the important question whether purported "opinions" explicitly based on false facts adduced to convince readers of the reasonableness of the "opinion" are actionable; to correct the erroneous interpretation of the state courts below of this Court's decision in *Milkovich*; and to protect the rights of redress for defamation of those who seek federal public office.

Respectfully submitted,

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1995

MAGDA MONTIEL DAVIS,	**	
Appellant,	**	
vs.	**	CASE NO. 94-2740
MARIETA FANDINO, et al.,	**	
Appellees.	**	

Opinion filed April 26, 1995.

An appeal from the Circuit Court for Dade County, Murray Goldman, Judge.

Kurzban, Kurzban & Weinger and Brian M. Torres and Bruce Rogow, for appellant.

Baker & McKenzie and Richard J. Ovelmen, for appellees.

Before SCHWARTZ, C.J., and NESBITT and GREEN, JJ.

PER CURIAM.

Affirmed. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990).

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

MAGDA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO,
HILDA INCLAN, and
MARIETA FANDINO
d/b/a "LA VERDAD,"

Defendants.
_____/

GENERAL JURISDICTION
DIVISION (30)

CASE NUMBER: 92-2238

FINAL JUDGMENT OF DISMISSAL

THIS CAUSE came before the Court on Defendants' Motion to Dismiss the Amended Complaint. Having heard argument of counsel, analyzed the memoranda of law submitted by the parties, reviewed the operative pleadings, and being otherwise fully advised, this Court rules that the Motion to Dismiss is *GRANTED* with prejudice, and a FINAL JUDGMENT OF DISMISSAL is hereby *ENTERED*.

1. This Court *FINDS* that the statements sued upon are protected by the First Amendment as non-actionable expression constituting political opinion and judgments. Under our Constitution, political debate is to be "wide-open and robust," and criticism of candidates for public office is permitted to be "caustic, vituperative, and rife with rhetorical hyperbole or vigorous epithet." *Milkovich*

v. Lorain Journal Co., 497 U.S. 16-17 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6 (1970); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

The seminal decision of the United States Supreme Court in *Milkovich v. Lorain Journal Co.*, controls the disposition of this case. In *Milkovich*, the Supreme Court explicitly held that expression indistinguishable from that published here is not actionable:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. *Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable.* Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.
>
> Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S., at 50, 99 L Ed 2d 41, 108 Ct. 876. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our

> Nation. *See id.*, at 53-55, 99 L Ed 2d 41, 108 S Ct 876.

497 U.S. at 19-20. (emphasis added). Thus, in *Milkovich*, the statement that a public official has embraced Marxism was held to inherently involve political judgments and opinion, and not to constitute, or imply, a statement of fact which is verifiably false. Accordingly, it was not actionable. In the case at bar, the statement that the Plaintiff is "pro-Castro," or serves his interests, similarly constitutes an expression of political opinion and judgment which is not actionable.

As *Milkovich* explains, this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech which is understood to communicate statements of opinion or political judgments, as opposed to false statements of verifiable fact. In *Greenbelt Cooperative Publishing Assoc.*, the Court held that accusing a public official of "blackmail" was not actionable, but rather was no more than vigorous epithet used to characterize his negotiating tactics. In *Letter Carriers v. Austin*, use of the term "traitors" to refer to nonunion workers was held not actionable. In *Hustler*, a political cartoon suggesting the plaintiff's first sexual experience was the act of incest with his mother in an outhouse was not actionable.

The statements sued upon here clearly fall within the ambit of protection afforded political speech by the First Amendment. The articles do no more than offer the author's political judgment and opinion that the plaintiff's views are much too sympathetic to the Castro regime.

That this Court finds the statements sued upon protected by the First Amendment does not mean that it endorses or approves of certain rhetorical excesses to be found in the articles. In particular, this Court finds repugnant and inappropriate the references to the plaintiff's spouse's ethnicity. But the First Amendment to our Constitution protects even these offensive characterizations, which this Court would have hoped would no longer be part of our political discourse.

2. The Amended Complaint is dismissed with prejudice. Because this Court finds that the published statements are protected by the First Amendment, Defendants' other grounds for dismissal need not be addressed. However, this Court does *FIND*, for the reasons set out more fully in the Defendants' Memorandum In Support of the Motion to Dismiss, that the Amended Complaint is deficient with respect to pleading factual allegations essential to a "public figure" defamation claim, and with respect to the claim for punitive damages. *Clark v. Boeing*, 395 So. 2d 1226 (Fla. 3d DCA 1981); *Frieder v. Prince*, 308 So. 2d 132 (Fla. 3d DCA 1975); Section 768.72 Florida Statutes; *Key West Convalescent Center, Inc. v. Doherty*, 619 So. 2d 367 (Fla. 3d DCA 1993). It is therefore

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is granted with prejudice, this action is dismissed with prejudice, that Plaintiff take nothing by this action, and the Defendants go hence without day.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 16 day of November, 1994.

/s/ Murray Goldman
MURRAY GOLDMAN
CIRCUIT COURT JUDGE

Copies furnished to:

Ira J. Kurzban, Esquire
Richard J. Ovelmen, Esquire

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382 CA 30
F.B.N. 796565

MAGDA MONTIEL DAVIS,
PLAINTIFF,
VS.
MARIETA FANDINO, HILDA INCLAN
and MARIETA FANDINO d/b/a
"LA VERDAD",
DEFENDANTS.

AMENDED COMPLAINT

PLAINTIFF, MAGDA MONTIEL DAVIS, (hereinafter "Montiel Davis") by and through the undersigned counsel, sues the Defendants, MARIETA FANDINO, HILDA INCLAN and MARIETA FANDINO d/b/a *"LA VERDAD"*, (hereinafter "Defendants") and alleges:

PARTIES AND JURISDICTION

1. This is an action for damages in excess of fifteen thousand dollars ($15,000.00).

2. At all times material hereto, Montiel Davis was and is a resident of Dade County, Florida.

3. Montiel Davis is a licensed attorney engaged in the practice of law in Dade County, Florida.

4. At all times material hereto, Defendants, Marieta Fandino and Hilda Inclan have been and are residents of Dade County, Florida.

5. Defendant Marieta Fandino d/b/a *"La Verdad"* is a so-called community newspaper published weekly for the Hispanic community and distributed throughout Greater Dade County, Florida, by the Defendants.

6. The Defendants, with the intent to injure the Montiel Davis' business and professional reputation, published libelous and false statements about Montiel Davis in *La Verdad* on September 24, 1992 and October 1, 1992.

7. Montiel Davis served Notice in writing upon the Defendants on September 30, 1992, and October 2, 1992, specifying the articles and the statements therein which were false and defamatory and requesting that the Defendants publish a retraction and apology in the newspaper in the same manner as the original publication within ten (10) days of service of the written notice or be the subject of legal action within five (5) days of service of the written notice (See correspondence attached hereto as Composite Exhibit "A").

8. Defendants have not retracted the false and libelous statements published on September 24, 1992 and October 1, 1992.

GENERAL ALLEGATIONS

9. For over thirty (30) years, the Cuban community in Miami, Florida (as well as its surrounding heavily

Cuban populated suburbs, i.e., Hialeah), has been dominated by persons who have actively demonstrated a direct and clear hostility against the regime of Fidel Castro in Cuba and anyone they believe (whether accurate or not) support that regime. The dominance of such persons in the Cuban community has been manifested by their violence, including lethal violence not only against individuals actually lending support to the Castro government, but even against individuals merely *perceived* as lending support in mere opinion or any other way.

10. In the last twenty years, certain Cuban exiles (later considered "heroes" within the Cuban community) have created a climate of fear and hatred in the Cuban community in Miami of anyone associated, or believed to be associated, with the Castro regime or not militant against it by engaging in activities in Miami and other cities in the U.S. designed to punish, physically or otherwise, persons who seek to exercise their rights of artistic freedom, academic freedom, and freedom of the press or assembly.

11. These actions have included the following:

a. The execution of two members of the Committee of 75, a group of Cuban exiles who met in Cuba with government officials to negotiate for the release of political prisoners;

b. The attempted assassination of a local radio newscaster because he had made a remark which some merely perceived as being soft on communism and therefore supportive of the Castro regime.

c. The bombing, on two occasions in 1990, of the Cuban Museum in Miami and the violent threat of execution against its directors for exhibiting paintings created by persons residing in Cuba.

d. The placing of death threats against David Lawrence, the publisher of the Miami Herald, and two other Herald executives for the paper's criticism of the Cuban American National Foundation's Cuba legislation, as well as smearing Herald news boxes with excrement.

e. In November 1990, Miami City Commissioners approved the installation of a star for Mexican singer Veronica Castro in the "Walk of Fame" sidewalk on Calle Ocho. But following her performance in Cuba on December 3, of last year, a mob of approximately 100 people surrounded the star, urinated on it and hacked it apart with hammers, while police looked on and did nothing. The next day, the City Commissioners voted unanimously to bar any replacement of the star without its approval.

f. In 1989, the Kiwanis Club of Little Havana banned three singers, Brazilian Denise de Kalafe, Puerto Rican singer Andy Montanez, and De Raymond – who performed in Cuba in 1981, 1980 and 1970 respectively – from appearing at the annual Cuban-American Festival. The festival had received a $15,000 grant from the Miami City Commission. At the time of a similar 1987 dispute, the club's director of promotions told the *Miami News* that it has a strict policy to bar from the festival any Latin American entertainer who has performed inside Cuba.

g. Ruben Blades, the Panamanian-born actor, was denounced on Miami as a "Communist" and a "Castro Agent," which has interfered with his performing

career there. In 1991, the host of a radio program received threatening calls after Blades appeared.

h. In 1988 the home of Maria Cristina Herrera, the founder and director of the Institute for Cuban Studies at Miami Dade Community College, was bombed.

i. In 1989, two bombs went off in the office of Marazul Travel – one of several companies engaged in lawful licensed travel to Cuba.

j. On February 23, 1992 three men assaulted and tied up employees at Radio Progresso and damaged the station's equipment.

k. On March 17, 1993 a legally authorized picket in front of radio Station WAQI called by the Alliance Workers of the Cuban Community (ATC) came under violent attack by more than 300 persons, many of them members of militant anti-Castro organizations who were called by Armando Perez Roura, general manager and news director of Radio Station WAQI to break up the demonstration.

12. These acts and many others often extend to persons who do not support the Castro Regime, but who may be involved in lawful businesses in sending food and medicine to their relatives in Cuba, and even lawfully seeking to visit those relatives.

13. In sum, certain persons who have dominated the Cuban community in the South Florida area have an expansively broad definition of being a Castro supporter and a person who is labeled as such, whether correctly or not, in the Cuban community is subject to verbal abuse,

economic sanctions, harassment, intimidation, physical violence and even death.

14. An environment has been created in the Cuban community that any other expression is immediately labeled and proclaimed by the Cuban community and its so-called newspapers as acts of treason *against* the solidarity of the (Miami) Cuban community.

15. In fact, a common bumper sticker seen any day in Miami spells out:

> "The only dialogue with Castro: Blindfolds, yes or no?"

16. Because of the totality of the circumstances created and existing within the Cuban community involving this anti-Castro obsession and frenzy, to be denounced as a "Castrista," or as Castro's representative, effectively and without a doubt *immediately* singles a person as a Communist and Castro supporter and summons the hatred, violence, contempt and prejudice of the audience towards the individual singled out.

17. Montiel Davis has been an attorney in the State of Florida since 1978. She announced her candidacy for U.S. Congress on or about July 13, 1992; she received her first bomb and life threats along with exhibitions of public disgust, contempt, humiliation and ridicule from the general public in Miami *immediately* after the Defendants' articles were published denouncing her as a "Castrista" and Castro's representative.

PRELIMINARY ALLEGATIONS

18. On or about September 24, 1992, on pages 1 and 7 of the newspaper *"La Verdad"*, the Defendants stated that Montiel Davis was a supporter of Fidel Castro ("Castrista").

19. The defendant made the statements with actual malice and knowledge that their statements would be perceived by the Cuban community, under the circumstances under which they were made, in the context in which they were made by Defendants, and in their totality, as allegations of fact that Montiel Davis had membership in organizations and well-defined political affiliations and beliefs, contrary to the Cuban community, and that the statements were false or with reckless disregard as to their truthfulness.

20. On or about October 1, 1992, the Defendants stated that Montiel Davis represents the interests of Fidel Castro in the United States. (See attached Composite Exhibit "B"). The Defendants made these statements with actual malice and knowledge that under the circumstances which the statements were made and in the context in which they were made and in their totality, that such statements would be perceived by the Cuban community as allegations of fact that Montiel Davis had membership in organizations, and well defined political affiliations and beiefs [sic] against the Cuban community in South Florida which would damage her reputation.

21. That the statements made by Defendants labeling Montiel Davis a "Castrista", and a representative of Castro in the United States were made with express malice and knowledge that the statements were false or with

reckless disregard as to their truthfulness and with the primary motive to injure Montiel Davis, rather than to conduct news reporting or protect any proper interest, knowing that in the medium and circumstances in which it was disseminated its audience would perceive such publication as statements of fact.

COUNT I

Libel Per Se

22. Plaintiff realleges and reavers paragraph 1 through 21 above as if fully set forth herein.

23. The statements are defamatory on their face.

24. The statements were false and were made with actual malice and knowledge that the statements were false, or with reckless disregard as to their truthfulness, and with a primary will to defame Montiel Davis and to injure Montiel Davis in her business, professional reputation and candidacy for United States Congress and as a representative of the people in South Florida.

25. The statements were purposefully made with the express and malicious intent to expose Montiel Davis to public hatred and contempt considering that in the Cuban-American community where the so-called community newspaper circulates, the statements clearly and convincingly, and on their face express terms of precision, meaning and usage continuously resulting in vicious abuse and even violence from the Community towards the individual or entity described with such terms.

26. The statements were purposefully made with the express and malicious intent to expose Montiel Davis

to public hatred and contempt considering that in the context in which the statements were made Defendants knew that the statements would be perceived as facts and not opinion by an audience which harbors hate and contempt for individuals associated with such precise terms.

27. The statements are false statements of verifiable facts and not mere expression of opinions.

28. The statements involve terms and concepts well-defined, established and recognized in the South Florida area targeted audience, rather than loose and varying terms, and are specifically susceptible to proof of truth or falsity in the South Florida area.

29. Defendants defamatory statements resulted in Montiel Davis' being subjected to name calling, bomb and life threats, and general ridicule and humiliation from total strangers to close friends and/or business associates, due to the hatred, contempt, prejudice and ridicule produced by Defendants' publications.

30. Montiel Davis has been damaged in her personal, professional and political life as a result of Defendant's conduct.

WHEREFORE, Montiel Davis demand [sic] this Honorable Court to enter a judgment in her favor for compensatory and punitive damages, and all other relief the court deems just and proper.

COUNT II

Libel

31. Montiel Davis realleges and reavers paragraph 1 through 21 above as fully set forth herein.

32. The statements are defamatory given the totality of the circumstances, including but not limited to the context in which they were published, the audience to which it was addressed to, and the well defined, precise, established and recognizable terms which they involved.

33. Defendants made the statements with actual malice and knowledge that the statements were false or with reckless disregard for whether they were false or not, in a context and circumstances where the statements would be regarded as factual rather than opinion by the audience.

34. The statements made by Defendant clearly and convincingly related to Montiel Davis' fitness for office as candidate for United States Congress.

35. Defendants defamatory statements resulted in Montiel Davis's being subjected to name calling, bomb threats, and general ridicule from total stranger's [sic] and colleagues and business associates, due to the hatred, contempt, prejudice produced by Defendants' publication.

36. Montiel Davis has been damaged in her personal, professional and political life as a result of Defendants' conduct.

WHEREFORE, MONTIEL DAVIS demands this Honorable Court to enter judgment in her favor for compensatory and punitive damages due to the express and actual malice on the part of the express and actual malice on the part of the Defendants and all other relief the court deems just and proper.

Respectfully submitted,

/s/ _____

LAZARA L. BALSEIRO, ESQ.
THE LAW FIRM OF
LAZARA LOURDES
BALSEIRO, P.A.
2650 S.W. 27 AVE. S-304
305-856-2056

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing has been mailed to Richard Ovelmen, Esq. at Baker & McKenzie, 701 Brickell Avenue, Miami, Florida, 33131 on this 14th day of March, 1994.

/s/ _____

LAZARA L. BALSEIRO, ESQ.

COMPOSITE "A"

Law Offices of
Lazara L. Balseiro, P.A.
ATTORNEY AT LAW

2650 S.W. 27th Avenue
Second Floor
Miami, Florida 33133
Telephone: (305) 446-1151
Fax: (305) 444-3503

September 30, 1992

Ms. Marieta Fandino and
Ms. Hilda Inclan
Radio Station WWFE
2381 W. Flagler Street
Miami, FL 33135

RE: Notice Pursuant to Florida Statutes §§ 770.01 and 770.02

Dear Ms. Fandino & Ms. Inclan:

Please be advised that I represent Magda Montiel Davis. On September 24, 1992 your newspaper ran a headline on both the front page and page 7, describing Ms. Davis as a supporter of Fidel Castro ("Castrista"). You also published a statement that Ms. Davis shares office space and is an associate of Mr. Ira Kurzban. When you published these statements, you knew them to be completely false and libelous.

Pursuant to Florida law, we will initiate legal action against you within five (5) days of this notice and you will have ten (10) days from today's date to place a retraction and apology in your newspaper in the same location and in the same manner as the original publication.

You and the newspaper will also be held personally responsible for any incitement to violence against Ms. Davis or her campaign that your article may cause.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Sincerely,

/s/ Lazara L. Balseiro
LAZARA BALSEIRO, ESQ.

LB/mc

Law Offices of
Lazara L. Balseiro, P.A.
ATTORNEY AT LAW

2650 S.W. 27th Avenue
Second Floor
Miami, Florida 33133
Telephone: (305) 446-1151
Fax: (305) 444-3503

October 2, 1992

Ms. Marieta Fandino and
Ms. Hilda Inclan
Radio Station WWFE
2381 W. Flagler Street
Miami, FL 33135

RE: Notice Pursuant to Florida Statutes §§ 770.01 and 770.02

Dear Ms. Fandino & Ms. Inclan:

On September 30, 1992 you were hand delivered a letter explaining to you the law of the State of Florida

concerning libel and slander, and your need to print a retraction and apology for the false and libelous statements you have published.

On October 1, 1992 you ignored the letter, and again published the same false and defamatory statements concerning Magda Montiel Davis. In the article of October 1, at page 7, and on the cover of your "newspaper," you again state that Ms. Davis represents the interests of Fidel Castro in the United States.

Please be advised that litigation will be instituted against you for this false and defamatory statement within five (5) days if an apology and retraction is not published within ten (10) days of the date of this letter. We will add to our claim against you exemplary and other damages.

PLEASE GOVERN YOURSELF ACCORDINGLY.

Sincerely,

/s/ Lazara L. Balseiro
LAZARA BALSEIRO, ESQ.

LB/mc

COMPOSITE "B"

La Verdad

LA LLAMADA LEY TORRICELLI ES UNA JUGADA TRAIDORA DE LOS CUBANOS MALNACIDOS

NO. 11 OCTUBRE DE 1992 DIRECTORA MARIELA GANDINO P.O. BOX 455 RIVERSIDE STA. MIAMI FL. 33135

opinion de la directora

NUESTRA LEGISLADORA ILEANA ROS SE ENFRENTA A LA DEFENSORA DEL CASTRISMO

MAS PRUEBAS DE LOS VINCULOS DE MAGDA MONTIEL CON EL TIRANO CASTRO

LA PATRIA CUBANA EXIGE EL AJUSTICIAMIENTO DEL TIRANO FIDEL CASTRO

MAS PRUEBAS DE LOS VINCULOS DE MONTIEL DAVIS CON EL TIRANO CASTRO

por hilda inclán

En un número anterior de La Verdad, publicamos documentos legales del record público de la corte judicial donde aparecía Ira J. Kurzban, esposo de la contrincante de Ileana Ros-Lehtinen, Magda Montiel Davis, como abogado de Pancho Aruca y de Marazul, firma extranjera que pertenece al gobierno de Fidel Castro en Cuba.

Hicimos la aclaración entonces de que esta Montiel Davis, abogada que nació en Cuba, comparte con su esposo el bufete legal de éste, lo ayuda y lo apoya, y políticamente se ha declarado en contra de todo lo que Ileana representa, que incluye la libertad de Cuba, causa que Ileana Ros-Lehtinen siempre ha defendido por sobre todo lo demás.

Más pruebas del nexo castrista de la demócrata que aspira al escaño de nuestra congresista Ileana Ros-Lehtinen.

Pues bien, nos siguen llegando informes de las vinculaciones de Kurzban con el gobierno del tirano que oprime nuestra patria. Y así como nos llegan estos documentos y los verificamos, los publicamos para el conocimiento de los votantes.

En 1979 y 1980, Kurzban, el esposo de la contrincante de Ileana, defendió al gobierno de Castro ante las córtes federales, solicitando la devolución para el tirano de más de $8 millones.

El caso de fecha diciembre 10 de 1979, tiene el número 79-112-CIV-CA. Los documentos de la corte federal del distrito demuestran que Ira Kurzban representó al Banco Nacional de Cuba y a la Empresa Cubana Exportadora de Alimentos y Productos Varios (Cubaexport) en este caso, junto al abogado Michael Krinsky, de Nueva York.

Según los argumentos de Kurzban en la corte, estas entidades del gobierno de Castro en Cuba fueron defraudadas de $8,775,000 en una carta de crédito usada para financiar una compra de café que no fue entregado.

Kurzban, pagado por sus servicios con dinero del gobierno cubano, hizo todo lo posible por conseguirle a Castro, la devolución de este dinero.

¿Se imaginan ustedes la felicidad de Kurzban si su esposa llegara al Congreso de los Estados Unidos en el escaño de Ileana? Sus oportunidades de servir a su cliente Fidel Castro se multiplicarían aún más...

Ileana nos salva del veneno pacifista y pro-Castrista de la Ley Torricelli.

Mientras tanto, nuestra congresista Ileana Ros-Lehtinen libró una titánica batalla dentro del Congreso de los Estados Unidos, que resultó un éxito para la causa de Cuba.

Ileana logró que se surprimiera de esta "nueva Ley" el inciso más negativo para los exiliados y para la causa de la liberación de Cuba: una declaración de que "Estados Unidos no tiene intenciones agresivas contra el régimen de Castro".

Ileana también logró la eliminación de otros "premios" para Castro que contenía esta polémica Ley. Estos son: una proposición de abrir oficinas recíprocas de noticias en Washington y en La Habana, así como los intercambios educacionales y científicos entre Cuba y los Estados Unidos. Todos estos contactos, que para la democracia

son aparentemente inofensivos, el sistema comunista cubano los aprovecha para infiltraciones, espionaje y ventajas de tipo político, explicó Ileana.

Su defensa de la Ley Torricelli ante el Congreso se limitó a explicar la necesidad de ejercer aún mayor presión económica contra Castro e insitió en que no se permitiera ningún escape legal a las sanciones contra las subsidiarias de firmas americanas en terceros países que han continuado comerciando con Castro, a razón de unos $706 millones anualmente.

Ileana se mantuvo firme en su defensa de prohibir terminantemente este comercio de las subsidiarias con Castro a pesar de la oposición de poderosos lobistas de firmas que han venido violando el embargo y beneficiando a Castro a través de terceros países, tales como Gillette, Exxon, la Goodyear y los elevadores Otis.

Se entiende, por lo tanto, que los que representan los intereses de Castro en el exilio, como Montiel Davis y su esposo Kurzban, ansíen sustituirla.

Claro, que se entiende también, que el pueblo cubano en el exilio *SALGA EN MASA* a votar por la máxima defensora de nuestros derechos y nuestros intereses en Washington, nuestra congresista, Ileana Ros-Lehtinen.

Para votar por Ileana el 3 de noviembre hay que inscribirse como votante antes del próximo lunes, 5 de octubre.

Según un estimado publicado el martes, unos 100,000 ciudadanos norteamericanos de origen hispano no se han inscrito todavía para votar. Inscribirse es fácil y no cuesta nada. Sólo tiene que mostrar su prueba de ciudadanía. A cambio, le otorgarán una tarjeta oficial de votante, que además de servirle para votar, le servirá como prueba de ciudadanía para viajes a las Bahamas, las antillas holandesas y otros destinos. La inscripción no le obliga a ningún tipo de compromiso. Simplemente lo califica como ciudadano norteamericano con el derecho al voto. Si el día de las elecciones, usted decide que quiere votar y no está inscrito, no podrá hacerlo.

El último día para inscribirse es el próximo lunes, 5 de octubre. Habrán voluntarios inscribiendo votantes por los centros comerciales este fin de semana. ¡Inscríbase y vote!

Los que ya estén inscritos, voten hoy antes de las 7 p.m. EN CONTRA del "Alcalde Fuerte" Ponchen "NO" en la boleta.

Hoy, primero de octubre, se decidirán las campañas de segunda vuelta que se desprendieron de las elecciones primarias dentro de los partidos Republicano y Demócrata.

Pero más importante todavía, en elecciones abiertas a todos los votantes del Condado de Dade, sin importar partido político o municipio de residencia, se decidirán hoy una serie de enmiendas trascendentales a la constitución del Condado de Dade, que incluye al área completa del Gran Miami, con todas sus ciudades así como el área "no incorporada".

De estas enmiendas, la más significante es la que convertiría al alcalde de Metro-Dade, en alcalde ejecutivo, con derecho a vetar las decisiones de los comisionados, de contratar y despedir al administrador del condado y de manejar el presupuesto de $3,200 millones anuales.

Para crear un sistema así, sería necesario que el alcalde fuese un empleado a tiempo completo y no un "parttime" que gana $6,000 al año, mientras que el administrador a tiempo completo gana $157,000. Sería necesario también crear un congreso a nivel del condado con Cámara y Senado, para proteger el balance de poderes, al igual que se hace a nivel nacional y estatal.

De lo contrario, estaríamos creando un "Zar" en el Condado que, en efecto, anularía el poder de las minorías hispana y negra. En el nuevo sistema de elecciones de los comisionados del condado por distrito étnico que se está considerando ahora, los hispanos tendrían una mayoría en la comisión, reflejando la mayoría numérica que representan hoy en día en la población del Condado.

Pero el "Alcalde Fuerte", propuesto en la boleta electoral de hoy, electo por todo el condado y no por distritos étnicos, y con derecho a vetar las decisiones de los comisionados, en efecto anularía este nuevo poder que al cabo de tantos años de verse marginada políticamente, ha ganado ahora la comunidad hispana.

Por eso, recomiendo que ponchen "NO" a la enmienda para un "Alcalde Ejecutivo" (Fuerte) en Dade

App. 22

La Verdad
No. 1109 OCTOBER 1, 1992, page 7

OUR LEGISLATOR ILEANA ROS-LEHTINEN TAKES ON THE DEFENDER OF CASTRO

MORE EVIDENCE OF MONTIEL DAVIS'S LINKS TO THE TYRANT CASTRO

MORE EVIDENCE OF MAGDA MONTIEL'S LINKS TO THE TYRANT CASTRO

by Hilda Inclán

[photo of Rep. Ileana Ros-Lehtinen]

In an earlier edition of La Verdad, we published legal documents of the judicial court's public record in which Ira J. Kurzban, the husband of Ileana Ros-Lehtinen's opponent, Magda Montiel Davis, appeared as the lawyer for Pancho Aruca and Marazul, a foreign company which belongs to Fidel Castro's government in Cuba.

We made the clarification then that this Montiel Davis, a lawyer who was born in Cuba, is a member with her husband of the latter's law firm, helps and support [sic] him, and politically she has declared herself against everything that Ileana represents, which includes the liberty of Cuba, a cause which Ros-Lehtinen has always defended above everything else.

More evidence of the Castro link of the Democrat who is vying for the seat of our Congresswoman Ileana Ros-Lehtinen.

Now then, we continue receiving reports of Kurzban's links to the government of the tyrant who

oppresses our country. And so as we receive these documents and we verify them, we publish them for the information of the voters.

In 1979 and 1980, Kurzban, the husband of Ileana's opponent, defended Castro's government before the federal courts, requesting the return to the tyrant of more than 8 million dollars.

The case, dated December 10, 1979, bears number 79-112-CIV-CA. Documents of the Federal District Court reveal that Ira Kurzban represented the National Bank of Cuba and the Empresa Cubana Exportadora de Alimentos y Productos Varios (Cubaexport) in this case, together with lawyer Michael Krinsky, of New York.

According to Kurzban's arguments in court, these entities of Castro's government in Cuba were defrauded of $8,775,000 in a letter of credit used to finance a purchase of coffee which was not delivered.

Kurzban, paid for his services with Cuban government money, did everything possible to obtain for Castro the return of this money.

Can you imagine Kurzban's happiness if his wife made it to the United States Congress in Ileana's seat? Their opportunities to serve their client Fidel Castro would multiply even more . . .

Ileana saves us from the pacifist and pro-Castro venom of the Torricelli Act.

Meanwhile, our Congresswoman Ileana Ros-Lehtinen waged a titanic battle in the United States Congress, which resulted in a victory for the Cuba cause.

Ileana managed to have deleted from this "new Act" the most negative paragraph for the exiles and for the cause of the liberation of Cuba: a declaration that the "United States has no aggressive intentions against the Castro regime."

Ileana also obtained the elimination of other "rewards" for Castro which this polemic Act contained. These are: a proposal to open reciprocal news bureaus in Washington and Havana, as well as educational and scientific exchanges between Cuba and the United States. All these contacts, which are apparently inoffensive for a democracy, are taken advantage of by the Cuban communist system for infiltrations, espionage and benefits of a political nature, explained Ileana.

Her defense of the Torricelli Act before Congress was limited to explaining the need to exercise even more economic pressure against Castro and she insisted that no legal loophole be permitted from the sanctions against subsidiaries of American firms in third countries which have continued trading with Castro, at the rate of some 706 million dollars annually.

Ileana remained firm in her defense of categorically prohibiting this trade of subsidiaries with Castro despite the opposition of powerful lobbyists of firms which have

been violating the embargo and benefitting [sic] Castro through third countries, such as Gillette, Exxon, Goodyear and Otis Elevators.

It is understood, therefore, that those who represent the interests of Castro in exile, such as Montiel Davis and her husband Kurzban, are anxious to replace her.

Of course, it is also understood that the Cuban people in exile WILL GO OUT EN MASSE to vote for the greatest defender of our rights and our interests in Washington, our Congresswoman, Ileana Ros-Lehtinen.

In order to vote for Ileana on November 3rd, you must register to vote before next Monday, October 5th.

According to an estimate published on Tuesday, some 100,000 American citizens of Hispanic origin have still not registered to vote. Registration is easy and does not cost anything. You only have to show your proof of citizenship. In exchange, they will give you an official voter's card, which besides being used to vote, will serve as proof of citizenship for trips to the Bahamas, the Netherlands Antilles and other destinations. Registration does not bind you to any kind of commitment. It simply qualifies you as an American citizen with the right to vote. If on election day you decide that you want to vote and you are not registered, you will not be able to do so.

The last day to register is next Monday, October 5th. There will be volunteers registering voters in shopping centers this weekend. Register and vote!

Those who are already registered, vote today before 7 p.m. AGAINST the "Strong Mayor." Punch "NO" on the ballot.

Today, October first, the second round campaigns will be decided which stemmed from the primary elections within the Republican and Democratic Parties.

But more important still, in elections open to all voters from Dade County, without regard to political party or municipality of residence, a series of important amendments to Dade County's charter will be decided today, which includes the entire area of Greater Miami, with all its cities as well as the "unincorporated" area.

Of these amendments, the most significant one is that which would convert the Metro-Dade mayor into an executive mayor, with a right to veto decisions of the Commissioners, to hire and fire the county administrator and to manage the 3.2 billion dollar annual budget.

In order to create such a system, it would be necessary for the mayor to be a full-time employee and not a "part-time" one who earns $6,000 a year, while the full-time administrator earns $157,000. It would also be necessary to create a 'Congress' at the county level with a House and Senate, just as there is at the national and state level.

Otherwise, we would be creating a "Czar" in the County which, in effect, would cancel out the power of the Hispanic and black minorities. In the new system of elections of County Commissioners by ethnic district which is being considered now, Hispanics would have a majority on the Commission, reflecting the numerical majority which they currently represent in the population of the County.

However, the "Strong Mayor," proposed on today's electoral ballot, elected by the whole county and not by ethnic districts, and with the right to veto the decisions of the Commissioners, in effect would cancel out this new power which the Hispanic community has now earned, after so many years of being politically marginalized.

Therefore, I recommend that you punch "NO" to the amendment for an "Executive Strong Mayor" in Dade.

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, A NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE, PERSONALLY APPEARS DR. LUIS A. DE LA VEGA – VICE PRES. FOR AND ON BEHALF OF PROFESSIONAL TRANSLATING SERVICES, WHO, AFTER BEING DULY SWORN, DEPOSES AND SAYS THAT (S)HE IS FULLY VERSED IN THE SPANISH AND THE ENGLISH LANGUAGES, AND THAT THIS IS A TRUE AND CORRECT TRANSLATION

OF THE ATTACHED DOCUMENT CONSISTING OF 2 PAGE(S), AND THAT THIS IS THE LAST OF THE ATTACHED.

/s/ Dr. Luis A. De La Vega, Vice Pres.

SWORN TO AND SUBSCRIBED THIS 11th DAY OF April, A.D., 1994.

/s/ Angela Smith
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE

MY COMMISSION
EXPIRES: 12-27-96 (SEAL)

(SEAL) NOTARY PUBLIC,
STATE OF FLORIDA
ANGELA SMITH
COMMISSION NO: CC-243189
MY COMMISSION EXPIRES
DEC. 27, 1996

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La Verdad

NO EXAGERAMOS AL ASEGURAR QUE LA MAFIA CUBANA EN MIAMI RECIBE ORDENES DEL CHACAL

NO. 110 SEPTIEMBRE 24 DE 1992 DIRECTORA MARIA PATRANDINO P.O. BOX 355 RIVERSIDE STA. MIAMI FL. 33135

opinion de la directora

RETO DEMOCRATA CASTRISTA A NUESTRA CONGRESISTA ILEANA ROS

ABUSOS CON LOS ALQUILERES DE CASAS Y APARTAMENTOS EN EL CONDADO DE DADE

LA PATRIA CUBANA EXIGE EL AJUSTICIAMIENTO DEL TIRANO FIDEL CASTRO

RETO CASTRISTA A NUESTRA CONGRESISTA ILEANA ROS

por hilda inclán

La pasada semana publicamos en esta página copia de los documentos legales del caso de la Oncena Corte Judicial del Condado de Dade, número 89-40564 CA 02, que demuestra que la oponente demócrata a nuestra congresista federal Ileana Ros-Lehtinen responde a intereses del régimen de Fidel Castro en Cuba.

El esposo y socio de bufete de esta retadora, tambien abogado, Ira J. Kurzban, representó a Francisco (Pancho) Aruca en un pleito que su agencia Marazul Charters Inc., descrita en la corte como "una corporacion exranjera", estableció en 1989 contra Radio Suave.

Su esposa nacida en Cuba, Magda Montiel-Davis, permanecio siempre en el anonimato publico hasta que anuncio su candidatura contra nuestra congresista cubanoamericana Ileana Ros-Lehtinen hace apenas dos semanas.

Montiel-Davis pertenece al bufete legal de su esposo, Kurzban Kurzban and Weinger, P.A. y mantiene sus oficinas en el mismo local que este. El bufete de la pareja también ha defendido a los haitianos y a los "maceitos" de Andrés Gómez. En 1989, este bufete fue escogido por el gobierno del tirano Fidel Castro para defender los intereses de Marazul, de Aruca, firma inscrita como extranjera, ya que le pertenece al gobierno de Castro.

Es de suponer que Castro no iba confiarle su dinero y la defensa legal de su agente más visible en Miami, Pancho Aruca, a un bufete enemigo *políticamente o en el que no* pudiera confiar plenamente.

La pregunta que se desprende es: ¿que cubano exiliado en su sano juicio votaria en favor de una desconocida -socia y esposa de un abogado de la confianza de Fidel Castro- y en contra de Ileana Ros-Lehtinen, que siempre ha defendido a los cubanos del exilio en su lucha por sus derechos y contra la tiranía castro-comunista de Cuba?

Los cubanos pro-castristas o pro-comunistas que apoyan a la oponente de Ros-Lehtinen, tratan de hacer ver que Ileana y la Fundación Nacional Cubano Americana, presidida por Jorge Mas Canosa, piensan igual y son la misma cosa.

Se trata, naturalmente, de una estrategia mezquina y baja que intenta restarle el apoyo a nuestra congresista de parte de los cubanos patriotas y dignos que luchan por la libertad de su patria, y condenan a Mas Canosa y su Fundación como grupo oportunista, entreguista y politiquero, que lucra con el dolor del pueblo cubano.

Ileana Ros-Lehtinen, sin embargo, era una figura pública más que conocida, querida y respetada en Miami como profesora primero y luego como legisladora y senadora estatal, mucho antes de que la Fundación se dedicara a utilizar los fondos recaudados para la libertad de Cuba para ganar influencias con los politicos, apoyandolos económicamente en sus campañas.

Ileana Ros luchó en dos contiendas electorales contra norteamericanos democratas liberales, repudiados por los hispanos de Miami, y la Fundación no echó rodilla en tierra por ella.

A nadie debe sorprenderle que, una vez que Ileana ya estaba instalada en el Congreso de los Estados Unidos en Washington, por el abrumador voto cubano e hispano de su pueblo en Miami, la Fundacion, en un derroche de su caracteristico oportunismo barato, tratara de sumarse al carro de su sonada victoria.

No nos importa que esta traicionera Fundación contribuya económicamente a la campana de Ileana. Sabemos que nuestra congresista se debe a los intereses del pueblo que la eligio

con más del 95 % de los votos cubanos, y no a los de la Fundación. Al que le quede alguna duda, que revise el historial de nuestra congresista y vea que siempre ha luchado y votado en favor de la libertad de Cuba y en contra del régimen de Fidel Castro.

La Fundacion, sin embargo, jamas ha lanzado un plan para la liberación de Cuba, a pesar de su poderio politico y económico.

Pero mas grave todavia. Su presidente Jorge Mas Canosa, finalmente se ha quitado la *careta de libertador* y ha confesado su traicion abierta a la "unidad para la guerra", que proclamó aqui en Miami junto a otras organizaciones hace menos de dos meses.

Jorge Mas Canosa confiesa su traidora estrategia de dialogo con los verdugos del regimen de Fidel Castro en Cuba.

En sus declaraciones mas recientes a la prensa, un Mas Canosa, que permanecio callado durante el embate del huracán Andrew, aunque se ha autodenominado lider del exilio cubano, produjo un escándalo entre los cubanos patriotas cuando confeso:

1.- Que su Fundación no apoya "ninguna intervención militar en Cuba, provenga de donde sea, incluso de Estados Unidos".

2- Que abriga esperanzas de poder producir un cambio pacífico en Cuba, según el: "sin sangre".

3.- Que no sólo apoya el dialogo y las negociaciones con el gobierno cubano, sino que además lleva más de dos años manteniendo contacto sobre el futuro politico de Cuba con importantes funcionarios del gobierno de Cuba.

4.- Que su Fundación prepara una emision de bonos de hasta $1.000 millones para ayudar a la privatizacion de la economia estatal de la isla para cuando caiga el régimen comunista de Castro.

Mas Canosa, que se reunió con un grupo de periodistas en Nueva York después de explicarle el plan de reconstruccion de Cuba postCastro de la Fundación a miembros de Americas Society, dijo que la emision de bonos generaría una economia de mercado libre de entre $7.000 y $16.000 millones en dos años.

El mercader, Mas Canosa, anteriormente ayudó a incluir en el Proyecto de Ley Torricelli prebendas economicas para Fidel Castro, entre las que se destacan la activacion de un nuevo cable telefónico entre Cuba y Estados Unidos que implica mas de $15 millones anuales para Castro y unos $75 millones al principio.

Nuestra congresista, Ileana Ros-Lehtinen, sin embargo, siempre ha estado muy clara en su apoyo a los combatientes cubanos que luchan militarmente y con las armas contra la tirania castrista y se opuso energicamente a las ventajas para Castro que incluia la Ley Torricelli.

Nuestra representante se ha mantenido en todo momento muy clara en contra a ningún tipo de dialogo, negociacion o entreguismo, ya sea con el tirano que excaviza al pueblo cubano o con sus funcionarios.

Nuestra representante seguira levantando su voz firme en los historicos salones del Capitolio en Washington en favor de una Cuba libre y soberana, sin entreguismos, sin claudicaciones, y sin traiciones.

Así lo indican sus condiciones como cubana digna, que cree firmemente en la libertad de su pueblo, su historial como figura publica, el de su familia y, principalmente, el de su padre, Enrique Ros, bien conocido entre los cubanos del exilio, como un hombre honesto y un incansable luchador por la libertad de su patria.

Finalmente, nuestra representante no necesita el apoyo económico de la Fundacion para su campaña electoral. A ella y a su familia le sobran los recursos economicos para su reeleccion.

Apóyela quien la apoye, Ileana Ros-Lehtinen ha demostrado siempre que se debe a las necesidades de su pueblo y a su propia conciencia, y no a los intereses de ningún grupo de cabilderos en particular.

Podemos decirle con toda seguridad a los intereses castristas y comunistas del exilio que lanzaron la candidatura de su contrincante democrata y que tratan de restarle popularidad a Ileana, vinculándola a la entreguista y oportunista Fundación, que su estrategia fracaso.

Los votantes saben de sobra que, en efecto, la Fundacion de Jorge Mas Canosa y nuestra representante Ileana Ros-Lehtinen, ni son ni han sido jamás, la misma cosa.

BEST AVAILABLE COPY

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La Verdad
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CASTROITE DEMOCRAT CHALLENGING OUR CONGRESSWOMAN ILEANA ROS

CASTRO ITE CHALLENGING OUR CONGRESSWOMAN ILEANA ROS

by Hilda Inclán

[photo of Rep. Ileana Ros-Lehtinen]

Last week, we published on this page a copy of the legal documents of the case of the Eleventh Judicial Court of Dade County, number 89-40564 CA 02, which shows that the Democratic opponent of our Federal Congresswoman Ileana Ros-Lehtinen responds to interests of Fidel Castro's regime in Cuba.

The husband and law firm partner of this challenger, also a lawyer, Ira J. Kurzban, represented Francisco (Pancho) Aruca in a lawsuit which his agency, Marazul Charters Inc., described in court as "a foreign corporation," filed in 1989 against Radio Suave.

His wife, Cuban-born, Magda Montiel-Davis, always remained in public anonymity until she announced her candidacy against our Cuban-American Congresswoman, Ileana Ros-Lehtinen, just two weeks ago.

Montiel-Davis is a member of her husband's law firm, Kurzban Kurzban and Weinger, P.A., and she has her offices in the same premises as the latter. The couple's law firm has also defended Haitians and the "Maceitos" of Andrés Gómez. In 1989, this law firm was chosen by

the *government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul, a firm registered as foreign, because it belongs to Castro's government.*

It is to be supposed that Castro was not going to trust his money and the legal defense of his most visible agent in Miami, *Pancho Aruca, to a law firm which was his enemy politically or one which he could not fully trust.*

The question which arises is: what Cuban exile in his right mind would vote in favor of an unknown – a partner and wife of a lawyer trusted by Fidel Castro – and against Ileana Ros-Lehtinen, who has always defended exiled Cubans in their struggle for their rights and against the Castro-communist tyranny of Cuba?

Pro-Castro or pro-communist Cubans who support Ros-Lehtinen's opponent try to make it look like Ileana and the Cuban-American National Foundation, headed by Jorge Mas Canosa, think alike and are the same thing.

It is a question, naturally, of a mean and low strategy which tries to take away the support for our Congresswoman on the part of the patriotic and worthy Cubans who fight for their country's freedom and condemn Mas Canosa and his Foundation as an opportunist, exploiting and politically scheming group, which profits from the Cuban people's pain.

Ileana Ros-Lehtinen, however, was a public figure who was already very well-known, loved and respected in Miami, first as a teacher and then as a state representative and senator, long before the Foundation engaged in using funds collected for the liberty of Cuba to earn

influence among politicians, supporting them financially in their campaigns.

Ileana Ros fought in two electoral battles against American liberal Democrats, repudiated by Hispanics from Miami, and the Foundation did not lift a finger for her.

It should come as a surprise to no one that once Ileana was already a member of the United States Congress in Washington, due to the overwhelming Cuban a [sic] Hispanic vote of her people in Miami, the Foundation, in a burst of its characteristic cheap opportunism, tried to leap on the bandwagon of her resounding victory.

It does not matter to us that this traitor Foundation contributes financially to Ileana's campaign. We know that our Congresswoman is indebted to the interests of the people who elected her with more than 95% of the Cuban vote, and not to those of the Foundation. Should there be any doubt, check the record of our Congresswoman and you will see that she has always fought and voted in favor of Cuba's freedom and against Fidel Castro's regime.

The Foundation, however, has never set forth a plan for Cuba's liberation, in spite of its political and economic power.

But more serious still, its President, Jorge Mas Canosa, has finally removed is [sic] mask as a *liberator* and has acknowledged his open betrayal of "unity for the war," which he proclaimed here in Miami together with other organizations less than two months ago.

Jorge Mas Canosa acknowledges his traitorous strategy of dialogue with the executioners of Fidel Castro's regime in Cuba.

In his most recent statements to the press, Mas Canosa, who remained silent during the onslaught of Hurricane Andrew, although he has named himself the leader of the Cuban exile community, caused a scandal among patriotic Cubans when he acknowledged:

1. That his Foundation does not support "any military intervention in Cuba, from anywhere, including the United States."

2. That he harbors hopes of being able to bring about peaceful change in Cuba, according to him: "without blood."

3. That he not only supports dialogue and negotiations with the Cuban government, but that he has also for more than two years maintained contact regarding Cuba's political future "with important officials of the of the [sic] Cuban government."

4. That his Foundation is preparing to issue up to $1 billion dollars in bonds to aid privatization of the island's state-run economy for when Castro's communist regime falls.

Mas Canosa, who met with a group of journalists in New York after explaining the Foundation's post-Castro reconstruction plan for Cuba to members of the Americas Society, said that the issuance of bonds would create a 7 – to 16 – billion dollar free-market economy in two years.

The merchant, Mas Canosa, previously helped include in the Bill for the Torricelli Act economic benefits for Fidel Castro, including those which call for activation of a new telephone cable between Cuba and the United States which means more than 15 million dollars a year for Castro and some 75 million dollars to start.

Our Congresswoman Ileana Ros-Lehtinen, however, has always been very clear in her support for the Cuban combatants who fight militarily and with weapons against Castro's tyranny, and she energetically opposed the benefits for Castro which the Torricelli Act included.

Our Representative has remained very clear at all times against any kind of dialogue, negotiation or political scheming, whether it is with the tyrant who enslaves the Cuban people or with his officials.

Our Representative will continue to speak out firmlyin [sic] the historic halls of the Capitol in Washington in favor of a free and sovereign Cuba, without giving in giving up, and without betrayals.

Thus do her conditions as a worthy Cuban indicate, that she believes firmly in the liberty of her people, her record as a public figure, that of her family and, mainly, that of her father, Enrique Ros, well known among the Cuban exile community as an upright man and a tireless fighter for the liberty of their country.

Finally, our Representative does not need the financial support of the Foundation for her electoral campaign. She and her family have more than enough financial resources for her reelection.

Support her who may, Ileana Ros-Lehtinen has always demonstrated that she has a duty to the needs of her people and to her own conscience, and not to the interests of any groups of leaders in particular.

We can say with all assurance to the Castro interests and communists in exile who launched her Democratic opponent's candidacy and who try to detract from Ileana's popularity, linking her to the politically scheming and opportunist Foundation, that their strategy failed.

The voters know all too well that, in fact, Jorge Mas Canosa's Foundation and our representative Ileana Ros-Lehtinen are not, and never have been, the same thing.

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

BEFORE ME, A NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE, PERSONALLY APPEARS DR. LUIS A. DE LA VEGA – VICE PRES. FOR AND ON BEHALF OF PROFESSIONAL TRANSLATING SERVICES, WHO, AFTER BEING DULY SWORN, DEPOSES AND SAYS THAT (S)HE IS FULLY VERSED IN THE SPANISH AND THE ENGLISH LANGUAGES, AND THAT THIS IS A TRUE AND CORRECT TRANSLATION OF THE ATTACHED DOCUMENT CONSISTING OF 2 PAGE(S), AND THAT THIS IS THE LAST OF THE ATTACHED.

/s/ Dr. Luis A. De La Vega, Vice Pres.

SWORN TO AND SUBSCRIBED THIS 11th DAY OF April, A.D., 1994.

/s/ Angela Smith
NOTARY PUBLIC, STATE OF FLORIDA
AT LARGE

MY COMMISSION EXPIRES: 12-27-96 (Seal)

(Seal) NOTARY PUBLIC STATE OF FLORIDA
ANGELA SMITH
COMMISSION NO: CC-243189
MY COMMISSION EXPIRES
DEC. 27, 1996

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No. 95-152

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

vs.

MARIETA FANDINO, HILDA INCLAN and MARIETA FANDINO d/b/a *LA VERDAD*,

Respondents.

On Petition for a Writ of Certiorari to the Third District Court of Appeal of the State of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly interpreted *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), in dismissing this libel suit, directed at a columnist's opinion that a candidate for Congress is pro-Castro ("Castrista") and "represents the interests of Castro in exile," on the ground that the term and the phrase, taken in proper context, do not assert, or imply, verifiably false and defamatory statements of fact, but rather constitute inherently controversial political opinions, caustic judgments, and vituperative epithets, which are protected by the First Amendment, particularly where published by a small "broadsheet-type" Spanish-language community newspaper in a signed column of political opinion during the heat of a political campaign?

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No. 95-152

In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a LA VERDAD,

Respondents.

On Petition For A Writ Of Certiorari to the Third District Court Of Appeal Of The State Of Florida

RESPONDENTS' BRIEF IN OPPOSITION

Marieta Fandino, Hilda Inclan, and Marieta Fandino d/b/a *La Verdad* respectfully request this Court deny the Petition for a Writ of Certiorari to review the judgment of the Third District Court of Appeal of the State of Florida.

OPINIONS BELOW

The judgment of the District Court of Appeal, Third District of Florida, which affirmed *per curiam* the judgment of the trial court, is reported at 643 So. 2d 516 (Fla. 3rd Dist. Ct. App. 1995), is included in the Appendix to the Petition, and states, in its

entirety, as follows: "Affirmed. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1(1990)." The judgment and opinion of the trial court is unreported and included in the Appendix to the Petition, at 2-6.

STATEMENT OF JURISDICTION

The Petition suggests jurisdiction over this appeal is governed by *St. Paul Title Insurance Corp. v. Davis*, 392 So. 2d 1304 (Fla. 1980), and *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980), because the decision of the District Court of Appeal was issued "without opinion." (Pet. Writ Cert. ("Pet.") at 2.) This is not correct. This appeal is governed by *Florida Star v. B.J.F.*, 530 So. 2d 286 (Fla. 1988), a subsequent decision of the Florida Supreme Court which addresses and controls the issue of its jurisdiction over decisions of the Florida District Courts of Appeal that are issued only with the citation of authority, as opposed to decisions with no opinion and no citation of authority.

In the text of *Florida Star*, the Florida Supreme Court asserts that it has subject matter jurisdiction over a decision which contains "a citation effectively establishing a point of law upon which the decision rests." *Id.* at 288. The court proceeds to hold that:

> While this Court has subject-matter jurisdiction to hear any petition arising from an opinion that establishes a point of law, we have operated within the intent of the constitution's framers, as we perceive it, in refusing to exercise our discretion where the opinion below establishes no point of law contrary to a decision of this Court or another district court.

Id. at 288-89. In a footnote, the Florida Supreme Court directly

addresses the distinction between decisions of the District Courts of Appeal that are issued without opinion, and those issued with only a citation of authority:

> This Court does not, however, have subject matter jurisdiction over a district court opinion that fails to expressly address a question of law, such as opinions issued without opinion or citation. Thus, a district court decision rendered without opinion or citation constitutes a decision from the highest state court empowered to hear the cause, and appeal may be taken directly to the United States Supreme Court. Moreover, there can be no actual conflict discernible in an opinion containing only a citation to other case law unless one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court or of this Court.

Id. at 288 n.3. Since the decision of the District Court of Appeal below contains only a citation to authority which was not pending in the Florida Supreme Court, which has not been reversed or receded from, and does not reference a contrary citation, the Florida Supreme Court would have lacked "constitutional discretion" to assume jurisdiction over the case on the basis of "conflict jurisdiction."

Respondents believe, although it may not be entirely clear, that direct petition for review from the District Court of Appeal to this Court is available here because, as a matter of Florida law, the

decision of the District Court of Appeal cannot be said to establish any proposition of law which could be in conflict with any other. If that is not the case, there would have been jurisdiction in the Florida Supreme Court, and the Petition would have to be dismissed for failure to exhaust state court remedies.

STATEMENT OF THE CASE

Because the Statement of the Case presented in the Petition materially misstates the claims made and adjudicated in the trial court, and misrepresents the issues properly before the District Court of Appeal, and because Petitioner consequently has posed "Questions Presented" to this Court which are not before it, Respondents submit this Statement which correctly reviews the record and properly states the issues decided below. In particular, it is shown that Petitioner did not argue in the Florida trial court that the statements sued upon are actionable because they are based on false statements of fact. Instead, she alleged that the statements sued upon were libelous per se, that is, libelous in and of themselves. The trial court properly ruled that, under *Milkovich*, the statements neither asserted nor implied verifiably false and defamatory statements of fact.

Petitioner could make no other argument to the trial judge because at no time in the trial court did she allege the falsity of the "factual statements" upon which, on appeal and now in the Petition, she asserts the opinion statements are based. This allegation was made for the first time on appeal. Since Florida appellate law precludes the raising of new issues on appeal which have not been presented to the trial court, and the Florida substantive law of libel requires that a retraction demand set forth specifically each false and defamatory statement or implication upon which a claim is made as a condition precedent to the lawsuit, this claim was not before the District Court of Appeal and not decided by it. Moreover, as noted above in the section on

Jurisdiction, the decision of the District Court of Appeal cannot be read as establishing any point of law which could be in discernable conflict with any other legal proposition, or there would have been jurisdiction in the Florida Supreme Court, not this Court.

This dispute arose out of the public debate over the political campaign of Petitioner, Magda Montiel Davis, against Ileana Ros-Lehtinen for a seat in the United States House of Representatives.

A. The Articles

La Verdad is a small "mom and pop" newspaper published weekly in Spanish for the Hispanic community in Dade County, Florida. (App. 8.)[1] On September 17, 1992, *La Verdad* published a by-lined column of political opinion by Hilda Inclan entitled "Proof Of The Link To Castro of the Woman Who Is Opposing Ileana Ros." (R. App. 6a-13a.)[2] The first five paragraphs of the column express the writer's high opinion of Ileana Ros-Lehtinen, and lauds her achievements as one of the leading political opponents of Fidel Castro in our national government. (R. App. 10a-11a.) The next three paragraphs introduce Plaintiff/ Petitioner, Magda Montiel Davis, as a challenger to Ileana Ros-Lehtinen, and react to Davis's widely reported and highly provocative hyperbolic statements that she "disagrees with everything Ileana represents" and that she was certain that for this reason in Miami she would be "branded a communist." (R. App. 11a) Ms. Inclan wrote:

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1. Citations to the Appendix to the Petition are referenced by "App.;" citations to the Appendix to this Brief in Opposition are designated by "R. App.".

2. The Articles are all published in Spanish. Certified translations into English that were used in the courts below are reproduced in the Appendices.

> Nevertheless, in November's general elections, a challenger to Ileana has emerged from the Democratic Party.
>
> In her first statements to the press this week, at the Plaza de la Cubania, Magda Montiel Davis, the Democratic candidate for Ros-Lehtinen's seat, said that she "disagrees with everything that Ileana represents . . ." and that she was sure that in Miami, she would be "branded a Communist."
>
> Well, if she herself says so, it must be for a reason. And if, to start with, she is against EVERYTHING that Ileana supports, then logically she is against the liberation of Cuba and in favor of the Castro-communism which governs the island nowadays and which Ileana combats, together with her Cuban constituency.

(*Id.*) Thus, the column makes the logical point that if Davis is to be taken at her word, that she "disagrees with everything Ileana Ros represents," then she must be in favor of "Castro-communism."

Ms. Inclan further observed that one of Magda Davis's principal positions, that "humanitarian" aid shipments be sent to Cuba, would be in the interest of her attorney husband's client, a known agent of Castro in South Florida who arranges shipping to Cuba, and "ultimately Fidel Castro" himself:

> Now then, with what little we know about this Montiel Davis, we have more than enough grounds to repudiate her completely.

> On the Cuban question, Montiel Davis is only interested in increasing "humanitarian" shipments to Cuba in order to benefit Castro. And it is logical for this to be so, because the principal agency of shipments to Cuba, Marazul Charters, owned by Pancho Aruca, is a client of her husband, Jewish-American lawyer Ira J. Kurzban, whose last name she does not use.

(*Id.*) The column next proceeded to comment on a lawsuit in which Magda Davis's husband represented Marazul Charters and Pancho Aruca. Ms. Inclan noted that Marazul Charters is the "principal agency of shipment to Cuba" and that Aruca is "Castro's agent." The columnist observed:

> And what a coincidence that for Kurzban's wife, the virtually unknown Magda Montiel Davis, on the subject of Cuba, what is most important is increasing shipments from Miami to the island, through Marazul Charters, of course, thus benefitting her husband's "client," and, ultimately, Fidel Castro.
>
> Our exile community, which has endured so much for nearly 34 years, cannot accept the representation of traitors such as Montiel Davis and her husband, who serve the tyrant Fidel Castro, through his agent in Miami, Francisco (Pancho) Gonzalez Aruca.

(*Id.* at 12a-13a) Although this column was attached and filed with the original Complaint, (R. App. 1a-13a), it was not sued upon, nor was a retraction demand served regarding it. (*Id.*) It is not

attached to the Amended Complaint. (App. 21-38.) No reference is made to it in the text of either version of the Complaint. (R. App. 1a-5a; App. 7-17.)

On September 24, 1992, *La Verdad* published another column by Hilda Inclan regarding Magda Montiel Davis. This second column, entitled "Castroite ["Castrista" in Spanish] Democrat challenging our Congresswoman Ileana Ros," (App. 30-38), begins by referring back to the comments made in the September 17 column. Inclan characterizes the earlier column as having shown that "the Democratic opponent of our Federal Congresswoman Ileana Ros-Lehtinen responds to interests of Fidel Castro's regime in Cuba." Inclan's second column also claims Davis is a member of her husband's law firm and has her offices in the same premises. (*Id.*) The section of the column commenting on Magda Davis ends with the following rhetorical question:

> The question which arises is: What Cuban exile in his right mind would vote in favor of an unknown — a partner and wife of a lawyer trusted by Fidel Castro — and against Ileana Ros-Lehtinen, who has always defended exiled Cubans in their struggle for their rights and against the Castro-communist tyranny of Cuba?

(*Id.* at 33.) The bulk of the column presents an intensely personal critique of Jorge Mas Canosa, and a spirited defense of Ros-Lehtinen. Contrary to the Petition, nothing could be clearer than the rhetoric employed is that of a column of political opinion.

On October 1, 1992, *La Verdad* published another Inclan opinion column entitled "Our Legislator Ileana Ros-Lehtinen Takes On The Defender of Castro, More Evidence Of Montiel

Davis's Links To The Tyrant Castro." (App. 21-29.) This column begins by again referring back to the original September 17 article. The column then comments on yet another lawsuit in which Kurzban, Davis's husband, represented Castro's interests in America:

> Now then, we continue receiving reports of Kurzban's links to the government of the tyrant who oppresses our country. And so as we receive these documents and we verify them, we publish them for the information of the voters.
>
> In 1979 and 1980, Kurzban, the husband of Ileana's opponent, defended Castro's government before the federal courts, requesting the return to the tyrant of more than 8 million dollars.
>
> The case, dated December 10, 1979, bears number 79-112-CIV-CA. Documents of the Federal District Court reveal that Ira Kurzban represented the National Bank of Cuba and the Empresa Cubana Exportadora de Alimentos y Productos Varios (Cubaexport) in this case, together with lawyer Michael Krinsky, of New York.
>
> According to Kurzban's argument in court, these entities of Castro's government in Cuba were defrauded of $8,775,000 in a letter of credit used to finance a purchase of coffee which was not delivered.
>
> Kurzban, paid for his services with Cuban

> government money, did everything possible to obtain for Castro the return of this money.
>
> Can you imagine Kurzban's happiness if his wife made it to the United States Congress in Ileana's seat? Their opportunities to serve their client Fidel Castro would multiply even more. . . .

(*Id.* at 23-24.)

The column then praises Ros-Lehtinen for her defense of the Torricelli bill and urges that readers vote for her re-election. The remainder of the column addresses the need for Cuban Americans to register to vote and concludes with Inclan's personal recommendation that each Cuban American vote against the "Strong Mayor" amendment. (*Id.* at 27-28.)

In this portion of the column there is but one reference to Magda Davis:

> It is understood, therefore, that those who represent the interests of Castro in exile, such as Montiel Davis and her husband Kurzban, are anxious to replace [Ros-Lehtinen].
>
> Of course, it is also understood that the Cuban people in exile WILL GO OUT EN MASSE to vote for the greatest defender of our rights and our interests in Washington, our Congresswoman, Ileana Ros-Lehtinen.

(*Id.* at 26.)

It is clear that these three publications are vituperative, caustic expressions of political opinion which criticize a

candidate for Congress for positions she has taken regarding Ros-Lehtinen and shipments of aid to Cuba, and for her close relationship (husband/wife) to an attorney who has represented Cuban interests in American courts.

B. The Retraction Demands

On September 30, 1992, original counsel for Magda Davis[3] served a retraction demand on *La Verdad* claiming three "statements" published in the September 24, 1992, column were false and defamatory:

> Please be advised that I represent Magda Montiel Davis. On September 24, 1992 your newspaper ran a headline on both the front page and page 7, describing Ms. Davis as a supporter of Fidel Castro ("Castrista"). You also published a statement that Ms. Davis shares office space and is an associate of Mr. Ira Kurzban. When you published these statements, you knew them to be completely false and libelous.

(App. 18-19.) Thus, the retraction demand complained only of the label "Castrista," and of her affiliation with her own husband.[4] No claims were made beyond the assertions quoted

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3. Davis's original counsel, Lazara Balseiro, Esq., resigned her representation of Magda Davis immediately after news reports and videotape broadcast throughout South Florida showed Davis being kissed by Fidel Castro in Havana, and Davis calling Castro the "great teacher" of the Cuban people. That being called a "Castrista" does not imply any verifiable factual statement is perhaps best demonstrated by Petitioner's apparent belief these acts would not justify application of the term to her.

4. These contentions are unusual in several aspects. First, it is unusual for a wife to claim that being called an "associate" of her husband, or having (Cont'd)

above.[5] The letter did not dispute the infamous Davis quotation that she "disagreed with everything Ileana represented;" it did not complain about the logical conclusion drawn from her statement; it did not identify any falsity with regard to Davis's position on shipments to Cuba; it did not state there was any false statement made regarding Aruca's status as an agent of Castro; it did not assert the claim regarding Marazul Charters' role in shipments to Cuba was false; nor was there any other complaint about the characterizations of the lawsuits in which Mr. Kurzban had previously been involved. It did not state that these statements gave rise to any actionable implication, or that they somehow made the three "statements" complained-of, "actionable."

On October 2, 1992, Davis's lawyer served a second retraction demand on *La Verdad*. This letter complained of a single false "statement":

> In the article of October 1, at page 7, and on the cover of your "newspaper," you again state that Ms. Davis represents the interests of Fidel Castro in the United States.

(Cont'd)
their law practices share premises, would injure her reputation. Of course, this is especially true since, as a matter of law, such statements are not defamatory. The assertions are also unusual since Davis and Kurzban have for years listed themselves as having the exact same address for their law offices in Martindale-Hubbell and the Florida Bar Journal. (Appendix D to Answer Brief of Appellees in Florida District Court of Appeal.)

5. Under Florida law, a libel suit is strictly limited to defamatory statements specified in the retraction demand. Fla. Stat. § 770.01 *et seq.* (1993). The retraction demand is a condition precedent to any libel suit, and statements not specifically identified in the retraction demand cannot be part of the claim. Section 770.01 Florida Statutes; *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950); *Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468, 1473-75 (S.D. Fla. 1987) (holding notice insufficient for failure to specify statements sued upon in retraction demand; collecting authorities).

(App. 20.)

Again, no other purportedly false and defamatory "statements" are identified. The retraction letters failed to explain any basis for concluding that anything in the articles was false or to provide any support for such a claim. (*Id.* at 19-20.)

C. The Complaints

The original Complaint, fewer than five pages in length, was filed October 19, 1992. It purported to assert a single count for libel per se by claiming *La Verdad* had published four false and defamatory "statements" regarding Davis:

> (1) that by calling her a "Castrista," the Sept. 24th column meant that she "was a supporter of Fidel Castro";
>
> (2) that the Sept. 24th column was incorrect in stating "she shares office space";
>
> (3) "and is an associate of Ira Kurzban"; and
>
> (4) that the Oct. 1st column libeled her by stating that she "represents the interests of Fidel Castro in the United States."

(R. App. 3a-4a.)

On November 9, 1992, the Defendants/Respondents moved to dismiss the Complaint on multiple grounds, including (1) that the defamatory "phrases" sued upon were protected opinion and not statements constituting or implying verifiable facts; (2) that any statements of facts which were sued upon were not defamatory; and (3) that ultimate facts necessary to state a cause of action were not pled.

By agreement, the Plaintiff filed an Amended Complaint on March 14, 1994. (App. 7-17.) The new complaint dropped the allegations regarding Davis's membership in Kurzban's law firm and sharing office space. (*Compare* Compl. ¶ 13, R. App. 3a, *with* Am. Compl. ¶¶ 18 and 20, App. 13.) The sole allegations of defamation in the Amended Complaint were that Defendants defamed Davis by calling her a "Castrista" and "a representative of Castro's interests in the United States" (App. 13-14, Am. Compl. ¶ 21.)[6]

The Amended Complaint again did not challenge or claim false any of the column's comments on Davis's position regarding Ros-Lehtinen, Davis's position on shipments to Cuba, Aruca's relationship to Castro, Marazul's relationship to Castro, or the characterization of the lawsuits in which Kurzban represented Cuban interests. (App. 7-17.) Thus, Davis's assertions on appeal and in her Petition, that certain of these statements are false, were not raised in either the retraction demands or the complaints.

D. The Dismissal Of The Amended Complaint

La Verdad moved once again to dismiss the Amended Complaint, and supported the motion with a memorandum of law which argued, among other things, that the political expression sued upon is not actionable under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990), and other Supreme Court precedent protecting "caustic, vituperative political speech rife with vigorous epithet," because it does not state, or imply, a verifiably false factual statement or factual connotation. (R. App.

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6. Elsewhere, the Amended Complaint characterized *La Verdad's* published statement as "Montiel Davis represents the interests of Fidel Castro in the United States." (App. 12, Am. Compl. ¶ 17.) The translation of the October 1 article submitted by Davis translates the language sued upon as "those who represent the interests of Castro in exile, such as Montiel Davis and her husband Kurzban." (App. 26.)

35a-50a.) The memorandum of law quoted language from *Milkovich* which it asserted precluded any finding that the political speech published here could be considered actionable:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.
>
> Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S., at 50, 99 L. Ed. 2d 41, 108 S. Ct. 876. This provides assurances that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See *id.*, at 53-55, 99 L. Ed. 2d 41, 108 S. Ct. 876.

(R. App. 39a-40a, quoting *Milkovich* at 19-20 (footnote omitted)). The memorandum argued that if it is not actionable to

state that "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," then it cannot be actionable to call Davis a "Castrista." More broadly the memorandum argued that words like "Castrista" are both too vague to imply any particular factual claims, but also cannot do so because they involve inherently controversial political judgments and opinions. There is no agreement as to what should count as justifying application of the term "Castrista."

The Plaintiff filed a twenty-page memorandum of law in which she argued in relevant part that the Amended Complaint stated a cause of action for libel because the two "statements" sued upon are themselves false and defamatory *per se*. (R. App. 15a-34a.) No claim was made in the memorandum that the statements sued upon are actionable because they are based on false statements of fact. Indeed, the memorandum made no claim that any statements other than the two sued upon are false. (*Id.*) Indeed, at oral argument before the trial court, Mr. Kurzban made it crystal clear that his argument was based solely on the defamatory nature and asserted verifiability of the two statements themselves:

> Both statements state — the first one states that Magda Davis is a supporter of Fidel Castro. The second statement was Montiel Davis represents the interests of Fidel Castro in the United States. Those are statements of fact. They can be verified as to whether or not — the implication obviously is that she's an agent for Fidel Castro in the United States and represents his interests.

(R. App. 66a.)

No argument was ever made before the trial court that there were false factual statements upon which the two actionable

statements were based, and that the falsity of those statements rendered the "opinion" statements actionable.

After hearing oral argument and reviewing the memoranda, the trial court dismissed the case with prejudice because it found that the statements sued upon are protected by the First Amendment as non-actionable expression constituting "political opinion and judgments." (App. 2.) The trial court quoted the relevant language from *Milkovich* concerning Marxism and expressly concluded that the language at issue here, like the language in *Milkovich*, was not actionable because it neither constituted nor implied a false statement of fact:

> *Thus, in Milkovich, the statement that a public official has embraced Marxism was held to inherently involve political judgments and opinion, and not to constitute, or imply, a statement of fact which is verifiably false. Accordingly, it was not actionable.* In the case at bar, the statement that the Plaintiff is "pro-Castro," or serves his interests, similarly constitutes an expression of political opinion and judgment which is not actionable.

(App. 4 (emphasis added).)

E. The Appellate Proceedings

In her Initial Brief to the District Court of Appeal, Davis principally argued that the trial court had misapplied *Milkovich*, but the brief also argued for the first time in the case that the two statements sued upon were actionable, even if themselves statements of opinion, because they were based upon other published statements that are verifiable and false. (Initial Br. 23-4). In particular, Davis alleged, as she has in the Petition, that the

statement that Aruca is an agent of Castro is false, that Marazul Charters is not a Castro corporation, and that her husband Kurzban is not Castro's lawyer in America. (*Id.*; Pet. 4-6, 10-13). But none of these claims had been made to the trial court.

Respondents, in their Answer Brief in the District Court of Appeal argued that *Milkovich* had been properly applied and that Florida law does not authorize an appellant to inject new claims and new issues into a case at the appellate level. (Answer Br. 10, 25).

In her Reply Brief, Davis's central argument was that the two statements sued upon were actionable because they were based upon the newly asserted false statements, that Aruca and Marazul Charters are not agents of Castro, and thus Kurzban is not Castro's lawyer in America. (Reply Br. 2-18).

The District Court of Appeal affirmed the trial court's order without opinion other than its citation to *Milkovich*.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because the Florida trial court correctly applied *Milkovich*, and the District Court of Appeal properly affirmed that application. The claims and issues that the Petition asserts in its Questions Presented were not argued in the Florida trial court, were not properly before the District Court of Appeal, and therefore were not preserved for review by this Court. For these reasons the writ should be denied.

A. The Florida Courts Correctly Applied *Milkovich*.

While this Court has noted that First Amendment rights are not absolute, it also has held that "it can hardly be doubted that the

constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, (1989), this Court reaffirmed that the First Amendment applies with special force to speech about candidates for political office:

> There is little doubt that "public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule," *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971), and the strongest possible case for independent review. As Madison observed in 1800, just nine years after ratification of the First Amendment:
>
> > "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 J. Elliot, Debates on the Federal Constitution 575 (1861).
>
> This value must be protected with special vigilance. When a candidate enters the

> political arena, he or she "must expect that the debate will sometimes be rough and personal," *Ollman v. Evans*, 242 U.S. App. D.C. 301, 333, 750 F.2d 970, 1002 (1984) (*en banc*) (Bork, J., concurring), *cert denied*, 471 U.S. 1127 (1985), and cannot "'cry Foul!' when an opponent or an industrious reporter attempts to demonstrate" that he or she lacks the "sterling integrity" trumpeted in campaign literature and speeches, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274, (1971). Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

491 U.S. at 686-87; *accord, Monitor Patriot Co.*, 401 U.S. at 274-76.

There is, this Court has observed, "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Such political expression often employs "rhetorical hyperbole" and "vigorous epithet." *Milkovich*, 497 U.S. at 17. This libel suit would seek to muffle our national conversation concerning candidates for Congress and censor our long-accepted tradition of "robust" and "wide-open" political speech.

In *Milkovich*, this Court held that political speech enjoys a formidable array of constitutional protections. The opinion reasoned that a separate and independent privilege for statements of opinion was not necessary because of these existing

protections. In particular, this Court found that the requirement that a statement must be "provable as false" to be actionable, a requirement imposed on all libel plaintiffs suing on matters of public concern, provides the press with adequate protection. Thus, this Court held, a statement of opinion is not actionable unless it implies a false statement of fact which is defamatory:

> Foremost, we think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant in involved. Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable. *Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.*
>
> Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell,* 485 U.S., at 50. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.

Id. at 19-20 (emphasis added; footnote omitted). A statement of opinion is simply not actionable if it does not contain or imply a false statement of fact, or if it cannot reasonably be interpreted as stating an "actual fact" about the plaintiff.

What *Milkovich* reaffirms is that political "name-calling," however defamatory, is not actionable, nor are expressions which inherently invoke political values and judgments, as opposed to those stating or implying facts. Moreover, the decision explicitly observes that a statement of opinion very nearly like the expression sued upon here is *not actionable:*

> Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable.

Id. at 20. The former statement is actionable because it logically entails or implies the fact that Mayor Jones has lied about matters. Such a factual claim may be verified. The latter statement implies only political judgments about Mayor Jones which cannot be empirically verified.

The point of law was perhaps best stated in Victor Lasky's celebrated lawsuit against ABC, *Lasky v. American Broadcasting Cos.*, 606 F. Supp. 934, 940 (S.D.N.Y. 1985):

> The recollections of Mr. Lasky, Ms. Mundel, Legionnaire Michael and others concerning the American Legion meeting presented a vivid picture of a community gathering, enlivened by a forceful speaker, discussing a matter of paramount public concern. Legionnaire Michael recalled that

both Mr. Lasky and Ms. Mundel engaged in a shouting match in which Lasky called Mundel a communist and she called him a Nazi. It is precisely this type of exchange which has been characterized in the law of libel as the expression of opinion, or more specifically, epithets which express a speaker's emotions rather than assertions of fact. Such name calling, in the context of public debate, is protected speech because of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and . . . it may well include vehement, caustic and sometimes unpleasant sharp attacks." *New York Times v. Sullivan*, 376 U.S. at 270, 84 S.Ct. at 720. Such speech has been characterized in other opinions by the Supreme Court as "no more than rhetorical hyperbole, a vigorous epithet . . . *Greenbelt Cooperative Publishing Assn. v. Bresler*, 398 U.S. 6, 14, 90 S.Ct. 1537, 1541, 26 L.Ed.2d 6 (1970), or "a lusty and imaginative expression . . . of contempt," *Letter Carriers v. Austin*, 418 U.S. 264, 286, 94 S.Ct. 2770, 2782, 41 L.Ed.2d 745 (1974).

In *National Association of Government Employees v. Central Broadcasting*, 396 N.E.2d 996 (Mass. 1979) *cert. denied*, 446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed.2d 788 (1980) the court explained that accusing another of being a communist is not libel when it occurs in the midst of public debate in which voices are expected to be raised in sloganeering invective.

Similarly, in the oft-cited case of *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir. 1983), *reh'g granted en banc*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), the court concluded that the expression "political Marxist" is not actionable.

> Having reviewed the context of the challenged statements, we turn next to the alleged defamation that, in our view, is most clearly opinion, namely that "[Ollman] is an outspoken proponent of political Marxism." This kind of characterization is much akin to the characterization, "fascist," found absolutely protected in *Buckley v. Littell*, *supra*. This is unmistakably a "loosely definable, variously interpretable statement[ ] of opinion . . . made inextricably in the contest of political, social or philosophical debate . . . ." 539 F.2d at 895. It is obviously unverifiable. Since Mr. Ollman concedes that he is a Marxist, *see* Letter of B. Ollman to the Editors of *The Washington Post* (May 8, 1978), R. 3, the trier of fact in assessing the statement would have the dubious task of trying to distinguish "political Marxism" from "nonpolitical Marxism," whatever that may be.

750 F.2d at 987. *Accord, Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994) (expression "sloppy journalism" not actionable when published in context of book review); *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987) (expression associating plaintiff with Nazi War criminal is non-actionable political "slur" in the nature of opinion when published in the context of public debate over rent-control); *McCabe v. Rattiner*, 814 F.2d 839 (1st

Cir. 1987) (use of "scam" to characterize encounter with condominium sales people is non-actionable opinion); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) (calling William F. Buckley, Jr., a "fascist," "fellow traveler," and member of "radical right" is protected opinion, not false statement of fact); *Haberstroh v. Crain Publications, Inc.*, 545 N.E.2d 295 (Ill. App. Ct. 1989) (labeling professor a "commie" is non-actionable rhetorical hyperbole).

Thus, the Florida courts correctly applied *Milkovich* to hold that calling Davis a "Castrista" and a "representative of Castro's interests in the United States" is "loose figurative political opinion" which does not imply or entail any verifiable factual statement about Davis:

> As *Milkovich* explains, this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech which is understood to communicate statements of opinion or political judgments, as opposed to false statements of verifiable fact. In *Greenbelt Cooperative Publishing Assoc.*, the Court held that accusing a public official of "blackmail" was not actionable, but rather was no more than vigorous epithet used to characterize his negotiating tactics. In *Letter Carriers v. Austin*, use of the term "traitors" to refer to nonunion workers was held not actionable. In *Hustler*, a political cartoon suggesting the plaintiff's first sexual experience was the act of incest with his mother in an outhouse was not actionable.
>
> The statements sued upon here clearly fall within the ambit of protection afforded

> political speech by the First Amendment. The articles do no more than offer the author's political judgment and opinion that the plaintiff's view are much too sympathetic to the Castro regime.

(App. 4.)

This is made especially clear by the facts of *Milkovich* itself and the implication it recognizes. The defamatory column in *Milkovich* stated repeatedly that the plaintiff had lied under oath at a judicial hearing held in a suit to enjoin sanctions against a high school wrestling program and its coach which were imposed by the Ohio High School Athletic Association ("OHSAA"). (497 U.S. at 4-5 quoting *Milkovich v. News-Herald*, 46 Ohio App. 3d 20, 21, 545 N.E. 2d 1320, 1321-1322 (1989).)

This Court held that because the column stated that the coach lied under oath in a judicial proceeding it implied that he committed the crime of perjury. This Court found this logically entailed assertion to be an implied statement of fact which could be readily verified since there was a transcript of the hearing, and one of his prior testimony in the OHSAA proceeding, and they were asserted to reflect totally different stories. The two transcripts needed only to be compared. *(Id.* at 21-22.)

Thus, what is meant by a factual implication or connotation is a fact which is logically entailed or "contained" in the assertedly actionable statement of opinion. If one opines that a person has lied under oath at a judicial proceeding, the remark entails the factual claim that the crime of perjury has been committed. Conversely, calling someone a "Castrista" or a "representative of Castro's interests in the United States" entails or implies no particular factual claim. This is not to say that many factual considerations would not be relevant in evaluating

whether the opinion is "well justified," but such considerations are not "implied," or entailed, or factual connotations contained in the expressions. This is not only because these expressions are too indefinite and figurative, but also because deciding what would count as evidence of being a "Castrista" demands inherently controversial political judgments and opinions, not verifiable facts. The Amended Complaint fails to state what facts it would prove to show the name "Castrista" is falsely applied because there is no list of verifiable facts which would do so, or which are entailed or implied by the term.

Davis's arguments to the contrary are wrong. To begin with, the trial court clearly understood and correctly applied *Milkovich*. There is nothing in his order to suggest that he did not. His order expressly states that the Marxist hypothetical in *Milkovich* was characterized as not actionable because it neither constituted, *nor implied*, any false statement of fact. The Final Judgment concludes that the language published by *La Verdad*, like that in *Milkovich*, was held "not to constitute, or imply, a statement of fact which is verifiably false." (App. 4.) Thus, Davis cannot claim the trial court's decision misunderstood *Milkovich*. Nor did the trial judge anywhere conclude *Milkovich* created a special independent privilege for opinion; rather, he applied *Milkovich* in a straightforward manner to preclude only suits in which a statement of opinion neither contained nor implied a factual connotation.

B. The Reasons For Granting The Writ And The Questions Presented For Review By The Petition Were Not Raised In The Florida Trial Court And Are Not Properly Before This Court.

In *Milkovich*, this Court held that "if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false statement of fact." 497 U.S.

at 18-19. In the trial court in this action Davis never claimed, as she does in the Petition, that the two opinion statements sued upon are actionable because they are based on the allegedly false claims that "Aruca is an agent of Castro; . . . Marazul Charters . . . belongs to Castro's government . . . that Ms. Davis's law firm was chosen by the government of the tyrant Castro . . . ." (Pet. 4-6, 12-13.) She never claimed these statements were false in her retraction demand, her two complaints, her memorandum of law in opposition to the motion to dismiss, or her oral argument to the trial court. She never made any argument predicated on their falsity, that the two statements sued upon were therefore actionable.[7] Thus, she never argued to the trial court that he should apply *Milkovich* to hold the two statements are actionable because these other statements are false. Her argument in the trial court was simply that the two statements assert false statements of fact that are libelous per se. It was only after she lost this argument in the trial court that she shifted to her new claim, arguing in the appellate court that statements not even asserted to be false in the trial court formed the predicate for her claim that the two statements sued upon are actionable because they are based on false statements of fact.

This argument fails for three reasons. First, as the Statement of the Case in this Response makes clear, the two statements sued upon, like most political opinions, are based on a host of considerations about Magda Montiel Davis, not just the statements she claims on appeal are false. Second, the fact that some of the considerations advanced as support for the opinion are mistaken (if they are), does not convert the opinions into false statements of fact, nor does it mean the opinions imply or infer

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7. Nor did she ever claim that she suffered "violent assaults" because of the statements, and that this claim should somehow be relevant to whether the statements are actionable. The Amended Complaint alleges she received telephone calls making bomb and death threats. Apparently, this is what the Petition means by "violent assaults" since no record of violent assaults exists.

those errors and are therefore actionable. Put differently, much of the South Florida Cuban exile community would consider Davis a Castrista irrespective of the truth of the statements she now claims are false. Her statements about Ros-Lehtinen, her positions on Cuban issues, her marriage to Kurzban, her trips to Cuba, her being kissed by the tyrant while calling him "teacher" are all considerations which could be marshalled in support of the opinion that she is Castrista. But that is scarcely the point. The issue is whether there are any agreed-upon verifiable facts which make one a "Castrista", or whether, like the terms "liberal", "conservative", "fascist," and "procommunist," application of this term depends on highly controversial political judgments which are not "facts" to be verified. An "opinion" or "epithet" can be "justified" or not, but it cannot be "verified."

Finally, the questions presented by the Petition are not properly before this Court because they were not presented to the Florida trial court, and thus as a matter of black letter Florida law, they were not preserved for review by the District Court of Appeal. Florida does not permit an appellant to raise new grounds for relief, or legal issues on appeal, that were not raised in the trial court. *Penn v. Florida Defense Fin. & Accounting Serv. Ctr. Auth.*, 623 So. 2d 459 (Fla. 1993); *Northeast Transp., Ltd. v. Lavender*, 643 So. 2d 1193 (Fla. 5th Dist. Ct. App. 1994), *Misty's Cafe Inc. v. Leon County*, 640 So. 2d 170 (Fla. 1st Dist. Ct. App. 1994); *Laursen v. Filardo*, 468 So. 2d 251 (Fla. 2d Dist. Ct. App. 1985). Florida law also does not permit new theories of the cause of action to be presented by the appellant on appeal. *Adamson v. First Fed. Sav. & Loan Ass'n of Andalusia*, 519 So. 2d 1036 (Fla. 1st Dist. Ct. App. 1988); *City Contract Bus Serv., Inc. v. Woody*, 515 So. 2d 1354 (Fla. 1st Dist. Ct. App. 1987); *United Bank of Pinellas v. Farmer's Bank of Malone*, 511 So. 2d 1078 (Fla. 1st Dist. Ct. App. 1987). Nor may a party shift its factual contentions on appeal to argue factual claims never made to the trial court. *Nixon v. Halpin*, 620 So. 2d 796 (Fla. 4th Dist. Ct. App. 1993).

Davis attempted without success to do all of these things in the District Court of Appeal, and now hopes to succeed in doing so in the Petition. This effort is wholly improper. Since these claims were not properly raised in the state courts below, this Court should not review them. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981), *United States v. Santana*, 427 U.S. 38, 41 n. 2 (1976), *Youakim v. Miller*, 425 U.S. 231, 234 (1976), *United States v. Mendenhall*, 446 U.S. 544, 551 n. 5 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD J. OVELMEN
Counsel of Record
BAKER & McKENZIE
Attorneys for Respondents
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APPENDIX A — COMPLAINT WITH EXHIBITS

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGDA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO,

HILDA INCLAN,

and

MARIETA FANDINO d/b/a "*LA VERDAD*,"

Defendants.

COMPLAINT

Plaintiff, MAGDA MONTIEL DAVIS, by and through the undersigned counsel, sues the Defendants, MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a "*LA VERDAD*," and alleges as follows:

PARTIES AND JURISDICTION

1. This is an action for damages in excess of fifteen thousand dollars ($15,000.00).

Appendix A

2. At all times material hereto, Plaintiff MAGDA MONTIEL DAVIS ("Montiel Davis") was and is a resident of Dade County, Florida.

3. Plaintiff Montiel Davis is a licensed attorney engaged in the practice of law in Dade County, Florida.

4. At all times material hereto, Defendant Marieta Fandino was and is a resident of Dade County, Florida.

5. At all times material hereto, Defendant Hilda Inclan was and is a resident of Dade County, Florida.

6. Defendant Marieta Fandino d/b/a "*La Verdad*" is a so-called community newspaper published weekly for the Hispanic Community and distributed throughout greater Dade County, Florida by Defendant Fandino.

7. Defendant Inclan, with the intent to injure the plaintiff's business and professional reputation, wrote and published libelous and false statements about Montiel Davis in "*La Verdad.*" Defendant Fandino published these false and libelous statements in "*La Verdad*" with the intent to injure the plaintiff's business and professional reputation.

8. Plaintiff Montiel Davis served notice in writing upon the defendants on September 30, 1992, specifying the article and the statements therein which are false and defamatory and requesting that the defendants publish a retraction and apology in the newspaper in the same manner as the original publication within ten (10) days of service of the written notice or be the subject of legal action within five (5) days of service of the written notice. See correspondence attached hereto as Composite Exhibit "A."

Appendix A

9. Following the notice of intent to initiate legal action, defendants republished the false and libelous statements on October 1, 1992 in "*La Verdad*."

10. Plaintiff Montiel Davis again served notice in writing upon the defendants on October 2, 1992, specifying the article and the statements therein which are false and defamatory, and requesting that the defendants publish a retraction and apology in the newspaper in the same manner as the original publication within ten (10) days of service of the written notice or be the subject of legal action within five (5) days of service of the written notice. See Composite Exhibit "A."

11. Defendants have not retracted the false and libelous statements published on September 24, 1992 and October 1, 1992.

PRELIMINARY ALLEGATIONS

12. On or about September 24, 1992, on pages 1 and 7 of the newspaper "*La Verdad*," the defendants stated that Montiel Davis was a supporter of Fidel Castro ("Castrista"). The defendants made these statements with actual malice and knowledge that the statements were false, or with reckless disregard of whether they were false or not. See Exhibit A.

13. In addition, defendants stated that Plaintiff Montiel Davis shares office space and is an associate of Ira Kurzban, an attorney practicing law in Dade County, Florida. See Exhibit A. The defendants made these statements with actual malice and knowledge that the statement was false, or with reckless disregard of whether it was false or not.

Appendix A

14. On or about October 1, 1992, after receiving written notice of the intent to initiate legal action if the above-referenced statements of September 24, 1992 were not retracted within ten (10) days, the defendants again stated that Montiel Davis represents the interests of Fidel Castro in the United States. The defendants made these statements with actual malice and knowledge that the statement was false, or with reckless disregard of whether they were false or not.

COUNT I

Libel *Per Se*

15. Plaintiff realleges and reavers paragraphs 1 through 14 above as if fully set forth herein.

16. The statements set forth in paragraphs 12 through 14 were false and were made with actual malice and knowledge that the statements were false, or with reckless disregard of whether they were false or not, and with a will to defame the plaintiff and to injure the plaintiff in her business and professional reputation.

17. Defendants re-published the allegations after being served notice of their falsehood, and libelous and defamatory nature.

18. Because of the aforesaid acts by the defendants, Plaintiff Montiel Davis has been damaged in her good name and reputation in the community, and has suffered mental and emotional anguish and pain and suffering.

WHEREFORE, Plaintiff Magda Montiel Davis, respectfully requests this Honorable Court enter Judgment in her favor for

punitive damages, nominal and compensatory damages, and such other and further relief as this Court deems just and proper. Plaintiff requests trial by jury on all issues triable to a jury.

Respectfully submitted,

LAZARA L. BALSEIRO, P.A.
2650 S.W. 27TH Avenue, 2d Floor
Miami FL 33133
Telephone: (305) 446-1151

By: s/ Lazara Balseiro
LAZARA BALSEIRO, ESQ.
Florida Bar No. 796565

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing was served upon the Defendants in this action.

s/ Lazara Balseiro
LAZARA L. BALSEIRO, ESQ.

Appendix A

EXHIBIT
NEWSPAPER ARTICLE IN *LA VERDAD*
DATED SEPTEMBER 17, 1992

LA VERDAD / Septiembre 17 de 1992 / Página 7

PRUEBA DEL VINCULO CON CASTRO
DE LA QUE RETA A ILEANA ROS

por hilda inclán

Ileana Ros-Lehtinen, la primera mujer, y la primera cubanoamericana de Miami en el Congresso de los Estados Unidos, no ha cesado de trabajar ni un instante por los cubanos y los hispanos de su área, adquiriendo cada dia que pasa una mayor popularidad entre el electorado.

Ante el Congresso de los Estados Unidos, en Washington, Ileana Ros-Lehtinen ha aprovechado cada oportunidad para defender el derecho de los cubanos a ayudar a su patria a ser libre. Sus denuncias ante el congresista demócrata de New Jersey, autor de la controversial "Ley Torricelli", para que se eliminaran del proyecto de ley las prebendas que beneficiaban económicamente a Fidel Castro, es ejemplo viviente de su combatividad.

Es conocida también su lucha por boletas electorales bilingües. ros-Lehtinen copatrocinó exitosamente una ley en el Congreso que extendió por 15 años la impresion de boletas bilingües en Dade y 67 condados más en toda la nación, donde existen más de 5% de una minoria que habla un idioma que no es el inglés. Según la ley, se imprimirán boletas bilingües por primera ves en el condado de Broward, donde residen más de 10,000 hispanos. La idea es que las minorias, ya sean haitianos,

hispanos, esquimales o indios norteamericanos, puedan ejercer el derecho al voto con pleno conocimiento ligüístico.

Ahora mismo, con la crítica situación de crisis por la que atraviesa nuestro Condado de Dade, debido al descomunal embate del huracán Andrew, el 24 de agosto, Ileana dio el paso al frente para ayudar a los hispanos. Nuestra congresista ayudó a obtener la ayuda federal, coordinada por la agencia FEMA, y organizó un seminario gratis, abierto al público, en una escuala para explicarle a los afectados — en su propio idioma español — cómo llenar las solicitudes para recibir la ayuda federal.

Incluso esta semana hemos visto a nuestra congresista en Washington echar la pelea ante el Congreso por la reconstrucción de la Base Aérea de Homestead, vital para la economia del Sur de Dade y para proteger a los Estados Unidos de un posible ataque de su principal enemigo, Fidel Castro, desde Cuba, y para ayudar en la guerra contra el narcotráfico.

Sin embargo, para las elecciones generals de noviembre, si le ha surgido una retadora a Ileana por el Partido Demócrata.

En sus primeras declaraciones a la prensa esta semana, en la Plaza de la Cubania, Magda Montiel Davis, candidata demócrata al escaño de Ros-Lehtinen, dijo estar en "desacuerdo con todo lo que Ileana representa . . ." y que estaba segura de que en Miami seria "tildada de comunista".

Bueno, si ella misma lo dice, por alogo será . . . Y si de entrada, está en contra de TODO lo que Ileana apoya, pues lógicamente está en contra de la libertad de Cuba y en favor del castro-comunismo que gobierna a la isla hoy en dia y que Ileana combate, junto a su electorado cubano.

Appendix A

Pues bien, con lo poco que conocemos de esta Montiel Davis, nos basta y not sobra para repudiarla totalmente.

En el caso cubano, a Montiel Davis sólo le interesa aumentar los envios "humanitarios" a Cuba para beneficiar a Castro. Y es lógico que así sea, ya que la principal agencia de envios a Cuba, Marazul Charters, de Pancho Aruca, es cliente de su esposo, el abogado norteamericano judio Ira J. Kurzban, cuyo apellido ella no utiliza.

En esta página reproducimos la prueba existente en la Onceava Corte Judicial del Circuito del Condado de Dade de las vinculaciones de esta arribista pro-Castrista con el tirano que lleva más de 33 años oprimiendo a nuestro pueblo.

Segun el acta oficial de la corte, record público que reproducimos aquí, en el Case Número 89-40564 CA 02, "Marazul Charters, Inc., una corporación extanjera autorizada a hacer negocios en el Estado de la Florida", le estableció un pleito a Radio Suave, en el cual el abogado de Marazul citaba a los representantes de esa emisora radial a una audiencia ante el Juez Ronald Friedman, el 3 de noviembre de 1989 a las 2 p.m.

La citación a corte aparece firmada por el esposo de Montiel Davis, Ira J. Kurzban, abogado de Marazul Charters, propiedad del del agente de Fidel Castro, Pancho Aruca. Kurzban firmó a nombre de su bufete Kurzban Kurzban and Weinger, Plaza 2650 SW 27th Avenue, Miami.

Y qué casualidad que para la esposa de Kurzban, la virtualmente desconocida magda Montiel Davis, en el asunto de Cuba, lo más imporante sea aumentar los envios de Miami a la isla, a través de Marazul Charters, por supuesto, beneficiando asi al "clente" de su esposo, y por ende, a Fidel Castro.

Appendix A

Nuestro exilio, que tanto ha sufrido por casi 35 años, no puede aceptar la representación de traidores como Montiel Davis y su esposo, que sirven al tirano Fidel Castro, a través de su agente en Miami, Francisco (Pancho) González Aruca.

Esto sólo serviría para atrasar y bloquear nuestras posibilidades de obtener una patria libre, nuestro derecho más sagrado, por el cual labora incansablemente nuestra congresista, Ileana Ros-Lehtinen.

Appendix A

EXHIBIT

TRANSLATION OF NEWSPAPER ARTICLE

La Verdad
No. 1107 SEPTEMBER 17, 1992, page 7

PROOF OF THE LINK TO CASTRO OF THE WOMAN WHO IS OPPOSING ILEANA ROS

by Hilda Inclan

Ileana Ros-Lehtinen, the first woman, and first Cuban-American from Miami, in the United States Congress, has not stopped working even one minute for the Cubans and Hispanics from her district, acquiring each day that passes greater popularity among the electorate.

In the United States Congress, in Washington, Ileana Ros-Lehtinen has taken advantage of each opportunity to defend the right of Cubans to help their country to be free. Her denunciations before the Democratic Congressman from New Jersey, the author of the controversial "Torricelli Act," so that the advantages which benefitted Fidel Castro economically be eliminated from the bill, is a living example of her fighting spirit.

She is also known for her battle for bilingual electoral ballots. Ros-Lehtinen successfully co-sponsored a law in the Congress which extended for 15 years the printing of bilingual ballots in Dade and 67 other counties throughout the nation, where there is a minority of more than 5% who speak a language other than English. Under the law, bilingual ballots will be printed for the first time in Broward County, where more than

10,000 Hispanics live. The idea is that minorities, whether they be Haitians, Hispanics, Eskimos or American Indians, can exercise the right to vote with full linguistic understanding.

Right now, with the urgent crisis situation which our Dade County is going through, due to the terrible beating by Hurricane Andrew on August 24th, Ileana took the lead in helping Hispanics. Our Congresswoman helped obtain federal aid, coordinated by the FEMA agency, and organized a free seminar, open to the public, at a school, to explain to those affected — in their own Spanish language — how to fill out applications to receive federal aid.

Just this week, we have seen our Congresswoman in Washington battle before Congress for reconstruction of Homestead Air [force] Base, vital for South Dade's economy and for protecting the United States from a possible attack of its principal enemy, Fidel Castro, from Cuba, and for helping in the war against drug-trafficking.

Nevertheless, in November's general elections, a challenger to Ileana has emerged from the Democratic Party.

In her first statements to the press this week, at the Plaza de la Cubania, Magda Montiel Davis, the Democratic candidate for Ros-Lehtinen's seat, said that she "disagrees with everything that Ileana represents . . ." and that she was sure that in Miami, she would be "branded a Communist."

Well, if she herself says so, it must be for a reason. And if, to start with, she is against EVERYTHING that Ileana supports, then logically she is against the liberation of Cuba and in favor of the Castro-communism which governs the island nowadays and which Ileana combats, together with her Cuban constituency.

Appendix A

Now then, with what little we know about this Montiel Davis, we have more than enough grounds to repudiate her completely.

On the Cuban question, Montiel Davis is only interested in increasing "humanitarian" shipments to Cuba in order to benefit Castro. And it is logical for this to be so, because the principal agency of shipments to Cuba, Marazul Charters, owned by Pancho Aruca, is a client of her husband, Jewish-American lawyer Ira J. Kurzban, whose last name she does not use.

On this page, we reproduce the proof existing in the Eleventh Judicial Circuit Court of Dade County of the links of this pro-Castro arrivists to the tyranny who has been oppressing our people for more than 33 years.

According to the official court document, a public record which we reproduce here, in Case Number 89-40564 CA 02, "Marazul Charters, Inc., a foreign corporation authorized to do business in the State of Florida," filed suit against Radio Suave, wherein Marazul's lawyer summoned the representatives of that radio station to a hearing before Judge Ronald Friedman on November 3, 1989, at 2 p.m.

The summons is signed by Montiel Davis's husband, Ira J. Kurzban, the lawyer for Marazul Charters, owned by Fidel Castro's agent, Pancho Aruca. Kurzban signed on behalf of his law firm, Kurzban Kurzban and Weinger, Plaza 2650 SW 27th Avenue, Miami.

And what a coincidence that for Kurzban's wife, the virtually unknown Magda Montiel Davis, on the subject of Cuba, what is most important is increasing shipments from Miami to the

island, through Marazul Charters, of course, thus benefitting her husband's "client," and, ultimately, Fidel Castro.

Our exile community, which has endured so much for nearly 34 years, cannot accept the representation of traitors such as Montiel Davis and her husband who serve the tyrant Fidel Castro, through his agent in Miami, Francisco (Pancho) González Aruca.

This would only serve to delay and block our possibilities of obtaining a free country, our most sacred right, for which our Congresswoman, Ileana Ros-Lehtinen, works tirelessly.

[copy of Notice of Hearing of the Circuit Court of the 11th Judicial Circuit in Dade County, dated September 24, 1989, in English.]

Appendix A

STATE OF FLORIDA)
) ss.
COUNTY OF DADE)

BEFORE ME, A NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE, PERSONALLY APPEARS DR. *LUIS A. DE LA VEGA – VICE PRES.* FOR AND ON BEHALF OF PROFESSIONAL TRANSLATING SERVICES, WHO, AFTER BEING DULY SWORN, DEPOSES AND SAYS THAT (S)HE IS FULLY VERSED IN THE *SPANISH* AND THE ENGLISH LANGUAGES, AND THAT THIS IS A TRUE AND CORRECT TRANSLATION OF THE ATTACHED DOCUMENT CONSISTING OF *2* PAGE(S), AND THAT THIS IS THE LAST OF THE ATTACHED.

s/ Luis A. De La Vega, Vice Pres.

SWORN TO AND SUBSCRIBED THIS *11th* DAY OF *April*, A.D., 19*94*.

s/ Angela Smith
NOTARY PUBLIC, STATE OF FLORIDA
AT LARGE

MY COMMISSION EXPIRES: 12-27-96 [SEAL]

The utmost care has been taken to ensure the accuracy of all translations. Profession Translating Services and its employees shall not be liable for any damages due to its own negligence or errors in typing or translation, nor shall it be liable for the negligence of third parties.

APPENDIX B — PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS DATED OCTOBER 17, 1994

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382 CA 30

MAGDA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD*,

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Magda Montiel Davis' Amended Complaint has alleged facts sufficient to state a claim for libel against Defendants in this action, and Defendants' Motion to Dismiss must be denied. Contrary to Defendants' Memorandum of Law, the Amended Complaint meets the constitutional requirements of adequately pleading the falsity of Defendants' statements and Defendants' malice in making them. Defendants' argument that they qualify for a constitutional exemption from suit for media

defendants is wholly unsupported. Moreover, the Amended Complaint properly states a claim for punitive damages under Florida law. Finally, none of the grounds for dismissal that Defendants assert in their Motion to Dismiss—most of which they failed to brief — warrants dismissal, and each must be denied as a matter of law.

ARGUMENT

I. PLAINTIFF MAGDA MONTIEL DAVIS HAS MET THE REQUIREMENTS OF THE FIRST AMENDMENT TO THE U.S. CONSTITUTION BY PLEADING ADEQUATELY THE FALSITY OF DEFENDANTS' STATEMENTS AND THEIR ACTUAL MALICE IN DOING SO.

The First Amendment to the U.S. Constitution does not shield the Defendants' defamatory statements from Montiel Davis' suit for libel. Montiel Davis has met the constitutional requirements of adequately alleging the falsity of Defendants' statements and their actual malice in doing so. In Part A of their argument, Defendants merely place their faith in the talismanic incantation "rhetorical hyperbole" to ward off this suit. This argument fails because the Constitution affords publishers no blanket exemption from defamation suits — even ones by public figures arising out of matters of public concern—simply because the defamatory speech qualifies as "political."

Instead, the Defendants must show that Montiel Davis has not met the constitutional requirements in this case, but Part B of Defendants' argument fails to do so. Defendants' two-sentence "analysis" merely asserts that Montiel Davis has failed adequately to plead falsity and malice. Because Defendants' have

not shown — and could not show — that Montiel Davis has failed to meet constitutional pleading requirements, their motion to dismiss on First Amendment grounds must be denied as a matter of law.

A. The Defendants' Defamatory Statements Are Actionable Under the First Amendment, Which Offers No Blanket Exemption from Libel Suits for "Political" Speech.

Defendants devote Part A of their Memorandum of Law to misconstruing First Amendment libel doctrine. In an "analysis" that rivals the one in Part B for superficiality, Defendants assert that "[t]he statements sued upon here clearly fall within the ambit of protection afforded political speech by the First Amendment." Defendants' Memorandum of Law ("Memo.") at 5. They deduce that dismissal is necessitated by "a long line of Supreme Court decisions [that have been] highly protective of defamatory political speech." *Id.* Defendants' claim their libelous attack was merely another instance of "rhetorical hyperbole common to political campaigns," *id.* at 4, and incredibly claim that if "Defendants [had] stated that the Plaintiff should be defeated in her election because she is an out-an-out Marxist, the publication still would not be actionable." *Id.* at 5. In other words, Defendants argue that the First Amendment permitted them without limit to bespatter Montiel Davis with whatever kind of defamatory untruths they could think up as long as their statements had some political content.

Defendants' assertions are simply in error and ignore the long-standing rule that the First Amendment does not protect libelous speech, even in a political context. There is no catch-all exemption from suit in First Amendment doctrine for political speech, as they suggest. As the United States Supreme Court has

held, the First Amendment affords Defendants no protection where they have made defamatory, false statements of fact, *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767, 775, 106 S. Ct. 1558, 1563 (1986), with actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726 (1964). This is true regardless of any content of public concern, *id.*, or that the defamed person is a public figure. *Curtis Publishing Co. v. Butts*, 338 U.S. 130, 164-65, 87 S. Ct. 1975, 1996 (1967). As the Court has noted, "The need to avoid self-censorship by the news media is, however, not the only societal value at issue . . . [or] this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation." *Gertz v. Robert Welch. Inc.*, 418 U.S. 323, 341, 94 S. Ct. 2997, 3007 (1974).

Thus, Defendants' argument in Part A that their statements do not constitute actionable libel is wholly without precedent in the First Amendment jurisprudence of the Supreme Court. While it remains true that *New York Times* seeks to protect "uninhibited, robust, and wide-open" debate on public issues, 376 U.S. at 270, 84 S. Ct. at 721, *New York Times* specifically permits suit for libelous statements against public officials. Defendants' mere assertions that their defamatory statements were of the protected type do not make it so. Instead, defendants gloss over the limitations of falsity and actual malice on defamatory political speech; their characterizations make it sound as if they were merely engaged in a light-hearted romp at Montiel Davis' expense, without any real consequences. See Memo. at 5. Defendants even go so far as to suggest that their statements would not be actionable even if "Defendants [had] stated that the Plaintiff should be defeated in her election because she is an out-and-out Marxist." *Id.* at 7. *New York Times* and its progeny, however, clearly would not protect these Defendants' malicious

dissemination of a blatant falsehood, such as that Montiel Davis is "an out-and-out Marxist," even if their opinion that Montiel Davis should not be elected is not actionable. In fact, the Florida Supreme Court has held that to accuse someone of being a communist is defamation per se. *Joopanenko v. Gavagan*, 67 So.2d 434 (Fla. 1953).

At best, Defendants' argument in Part A is irrelevant because it fails, as it must, to show that political speech is generally exempted from suit for libel, or that their statements in particular are not actionable. To the contrary, the Defendants' statements are actionable as long as Montiel Davis adequately pleads, as she has, and ultimately proves those statements' falsity and the Defendants' actual malice. *Hepps* 475 U.S. at 775, 106 S. Ct. at 1563; *New York Times*, 376 U.S. at 280, 84 S. Ct. at 726.

B. Montiel Davis Has Met the Constitutional Requirements of Adequately Pleading the Defendants' Actual Malice and the Falsity of Their Statements.

The real constitutional issue that Defendants' motion to dismiss raises is not whether Defendants' statements are per se exempt from suit under the First Amendment, but whether Montiel Davis has adequately pleaded the elements of falsity and actual malice that the Constitution requires. Montiel Davis has pleaded facts sufficient, when proven, to establish each element of libel, notwithstanding Defendants' contentions to the contrary.

Once again substituting bare assertion for argumentation, Part B of Defendants' Memorandum of Law does not afford the court any basis for dismissal of Montiel Davis' suit. As in Part A, Part B consists of several pages of block quotes to which the following analysis/conclusion is appended:

Appendix B

> The Amended Complaint contains no allegations which if proven would establish the statements published are false. The Amended Complaint likewise contains no factual allegations which if proven would establish that Defendant know [*sic*] the statements sued upon are false, or entertained serious doubts as to their truth when they published this.

Memo. at 10. Though the United States Supreme Court has certainly been concerned not to chill the political speech rights of media defendants, it has never held that a plaintiff's libel suit should be dismissed on the defendant's mere assertion that plaintiff has failed to allege falsity and actual malice. That is apparently what Defendants here seek to persuade this court to do.

But aside from whatever position the Defendants advocate, their Motion to Dismiss must fail for the simple reason that Montiel Davis has pleaded facts which, when proven, will establish falsity and actual malice (as well as the elements of defamation in Florida, see Part III.A, B). Taking all of the allegations of the Amended Complaint as true, as the court must, *Florida Medical Center Inc. v. New York Post Co. Inc.*, 568 So.2d 454, 458-59 (Fla. 4th DCA), *reh'g denied*, 581 So.2d 1309 (1990), Montiel Davis' complaint clearly alleges that the Defendants' statements were false and susceptible to proof or disproof in ¶¶ 24, 27, and 28. Moreover, she also alleged throughout the complaint that, in the South Florida area, the Defendants' statements would be understood by the Cuban community as representations of fact and not opinion. See Amended Complaint at ¶¶ 19-21, 26, and 33. Finally, the

retraction letters that Montiel Davis sent to the Defendants also specified the false statements that defamed her. See Amended Complaint at ¶ 7 (Composite Exhibit "A").

Similarly, Montiel Davis' Amended Complaint also adequately alleges actual malice. Actual malice in the libel context means knowledge that a statement is false, or reckless disregard as to whether a statement is false, *New York Times*, 376 U.S. at 279-80, 84 S. Ct. at 726, or "serious doubt" as to the truth of a publication. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325 (1968). The Amended Complaint states in numerous places that the Defendants purposefully made the statements, knowing and intending that in the political context of South Florida and the Cuban community, that the statements would be taken as representations of fact that would discredit and defame Montiel Davis. See Amended Complaint at ¶¶ 19-21, 24-26, and 33. This is confirmed by the Defendants' use of terms like "Castrista," which is facially derogatory in the Cuban community, and which bear no relation to Montiel Davis' political views. See Amended Complaint (Composite Exhibit "B").

Defendants' summary conclusion that the Amended Complaint contains no factual allegations supporting actual malice is therefore baseless. See Memo. at 10. Moreover, Defendants are apparently unaware that the U.S. Supreme Court has held that discovery into a media defendant's state of mind and its editorial process is not barred by the First Amendment. *Herbert v. Lando*, 441 U.S. 153, 170-71, 99 S. Ct. 1635, 1645 (1979). Thus, even if Montiel Davis' allegations with regard to actual malice are deficient — which she does not concede — she should still be allowed to pursue direct evidence of actual malice through discovery, having alleged the Defendants' actual malice in her amended Complaint.

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In sum, Defendants' constitutional arguments for dismissal of the complaint must be rejected. They have failed to show that their statements were protected speech of a political nature, just as they have without merit asserted that Montiel Davis did not adequately plead falsity and actual malice.

II. MONTIEL DAVIS' CLAIM FOR PUNITIVE DAMAGES SHOULD NOT BE DISMISSED OR STRUCK BECAUSE PUNITIVE DAMAGES ARE PERMITTED IN FLORIDA INTENTIONAL TORT CASES IN WHICH MALICE IS AN ESSENTIAL ELEMENT OF THE TORT, AND FLORIDA STATUTE § 768.72 PROVIDES NO BASIS TO DISMISS OR STRIKE THE CLAIM.

Defendants' final claim in Part C of its Memorandum of Law is that Florida Statutes § 768.72[1] bars Montiel Davis' claim for punitive damages because the "Amended Complaint proffers no evidence establishing actual malice and express malice, both of which are required to obtain punitive damages in a Florida public

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1. F.S.A. § 768.72 provides:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial net worth shall proceed until after the pleading concerning punitive damages is permitted.

figure libel suit." Memo. at 11. Defendants are wrong for three reasons.

First, Florida courts have held that "punitive damages are always recoverable in intentional tort cases where malice is one of the essential elements of the tort. The underlying rationale for this rule is that the proof of malice required to make out the cause of action is also sufficient evidence of malice on the part of the defendant to permit the jury to award punitive damages as punishment." *Ciamar Marcy, Inc. v. Monteiro Da Costa,* 508 So.2d 1282 (Fla. 3d DCA 1987); see also *Cardenas v. Miami-Dade Yellow Cab Co.,* 538 So. 2d 491, 494 (Fla. 3d DCA 1989) (approving punitive damages upon a showing of malice for false imprisonment). Since *New York Times* requires public figure plaintiffs suing media defendants for libel to prove actual malice, 376 U.S. at 180, 84 S. Ct. at 726, Montiel Davis' claim for punitive damages should be allowed.

Second, to dismiss or strike Montiel Davis' punitive damages claim would require the court to blind itself to the third sentence in § 768.72, which states, "The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages." As stated in Part I, *supra*, Montiel Davis has sufficiently pleaded facts of actual malice with respect to constitutional requirements, and dismissal on that ground is inappropriate. If that is true, then it would be premature and a narrow reading of the rules of civil procedure to strike the punitive damages claim at this stage of litigation merely because the "Amended Complaint proffers no evidence establishing actual malice and express malice." Memo. at 11. Moreover, the language of the statute itself — "reasonable showing by evidence in the record or proffered by the claimant"

— contemplates the striking of punitive damages claims only at trial, or at least until such time as discovery has progressed to the point that the plaintiff should have been able to prove malice.

The last reason Defendants are wrong that Montiel Davis' punitive damage claim should be struck or dismissed is that to do so now under the authority of § 768.72 would cause a conflict with F.S.A. § 770.02, which limits a plaintiff to recovery of actual damages

> if it appears *upon the trial* that [the defamatory statement] was published in good faith; that its falsity was due to an honest mistake of the facts; that there were reasonable grounds for believing that the statements . . . were true; *and* that, within the period of time specified in subsection (2), a full and fair correction, apology, or retraction was . . . published.

F.S.A. § 770.02(1) (emphasis added). Section 770.02(1) clearly contemplates limiting the plaintiff to actual damages only upon *trial*, not upon the initial pleadings. Moreover, since Defendants never published a correction, apology, or retraction, see Amended Complaint at ¶¶ 7-8, § 770.02 permits Montiel Davis' recovery of punitive damages. To dismiss or strike the claim under § 768.72 would therefore require the court to read the two statutes together in an inconsistent manner.

For all of the above reasons, Defendants' motion to dismiss or strike Montiel Davis' punitive damages claim should be denied.

Appendix B

III. THE OTHER GROUNDS FOR DISMISSAL THAT DEFENDANTS' RAISED IN THEIR MOTION, BUT WHICH THEY DID NOT ADDRESS IN THEIR MEMORANDUM OF LAW, PROVIDE NO BASIS FOR DISMISSAL OF MONTIEL DAVIS' AMENDED COMPLAINT.

Aside from the constitutional and punitive damages issues raised in their Motion to Dismiss, Defendants did not brief the other grounds for dismissal that they alleged in their motion. It is unclear whether Defendants' failure to do so constitutes an abandonment of those claims based on an implicit acknowledgement of their lack of merit, or whether Defendants nevertheless intend to raise those grounds upon the hearing on the motion. Whatever the case, none of those grounds warrant dismissal of the Amended Complaint. Each is addressed in order.

A. Florida Recognizes Causes of Action for Libel Se, and the First Count of the Amended Complaint Has Stated Such a Cause of Action.

Defendants' assertion that "Florida law no longer recognizes a cause of action for 'libel per se' by a 'public figure' against media defendants" is wrong. Motion to Dismiss ("Motion") at ¶ 1. A number of Florida cases have squarely addressed the issue and have reversed dismissals predicated on the ground that Defendants urge.

In *Mid-Florida Television Corp. v. Boyles*, 467 So.2d 282, 283 (Fla. 1985), the Florida Supreme Court held that the U.S. Supreme Court's decision in *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 94 S. Ct. 2997 (1974), did not abrogate the common law cause of action for "libel per se" where a private person was suing

a media defendant. *Gertz* held, *inter alia*, that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth" — that is, actual malice. 418 U.S. at 349, 94 S. Ct. 3011. Before *Gertz*, however, damage and liability could be presumed conclusively as a matter of law from words amounting to libel per se, without pleading or proving them. See *Mid-Florida*, 467 So.2d at 283. Nevertheless, the *Mid-Florida* Court stated that "for purposes of pleading in a negligence action against the media, labeling an action libel per se remains a useful shorthand for giving notice that the plaintiff is relying upon the words sued upon as facially defamatory, and therefore actionable without resort to innuendo." *Id.*

Florida appellate courts have held that plaintiffs had stated causes of action for libel per se in other contexts as well. In one instance, the Fifth District Court of Appeal held that a public figure had stated a libel per se claim based on a satirical poem that arguably referred to her as a "hooker." *Ford v. Rowland*, 562 So.2d 731, 735 (Fla. 5th DCA 1990). In another case, a newspaper employee had stated a libel per se claim against the newspaper for sending an ambiguous letter to a reader that reasonably could have been interpreted to imply facts imputing improper conduct to the employee. *Perry v. Cosgrove*, 464 So.2d 664, 666 (Fla. 2d DCA 1985).

Clearly, Florida courts recognize claims of libel per se, and Montiel Davis' Amended Complaint has stated such a claim. A publication is per se libelous if,

> when considered alone without innuendo, it tends to subject a person to hatred, disgust, ridicule, contempt, or disgrace, or tends to

> injure him in his trade or profession, or if it imputes to another conduct, characteristics, or a condition incompatible with the proper exercise of his lawful business, trade, profession, or office.

Id. Aside from adequately alleging falsity and actual malice, as explained in Part I.B., *supra*, Count I of the Amended Complaint also sufficiently alleges that Defendants published statements that are libelous per se under this definition. Count I alleges that the statements are facially defamatory, ¶ 23, and injured Montiel Davis in her personal, professional, and public life, ¶¶ 24-26, 29-30, by subjecting her to public hatred, ridicule, humiliation and contempt, ¶¶ 25-26, 29, as they were intended to do.

Thus, the Motion to Dismiss for alleging a non-cognizable claim must be denied.

B. The Amended Complaint and the Retraction Letter Clearly Specified the False Statements that Defamed Montiel Davis, and Montiel Davis Has Complied with Florida's Retraction Statutes Prior to Bringing Suit.

Florida Statutes §§ 770.01 and 770.02 require that a libel plaintiff provide notice to a publisher prior to bringing suit, so that the publisher may retract the defamatory statement within the statutorily allotted time. *See* F.S.A. §§ 770.01, 770.02. Montiel Davis complied with the notification requirement by written requests for retraction on September 30, 1992 and October 2, 1992. Amended Complaint at ¶ 7 (Composite Exhibit "A"). The Amended Complaint generally avers compliance with the retraction statute, and therefore the complaint is sufficient in that respect to survive dismissal for failure to comply with a

condition precedent. See *Edward L. Nezelek v. Sunbeam Television Corp.*, 413 So.2d 51, 56 (Fla. 3d DCA 1982) (requiring general averment of compliance with condition precedent to state a cause of action).

Defendants allege, however, that the Amended Complaint and retraction letters failed to specify which statements were false and defamatory. Motion at ¶ 2. Adequate notice must specify the article and the statements alleged to be false and defamatory, *Gannet Fla. Corp. v. Montesano*, 308 So.2d 599, 599-600 (Fla. 1st DCA 1975), and must be specific enough to enable a defendant to retract any allegedly false statements and thus to mitigate the harm caused by those statements. *Cook v. Pompano Shopper Inc.*, 582 So.2d 37, 39 (Fla. 4th DCA 1991). Even a superficial examination of Montiel Davis' retraction letters, attached to the complaint as Composite Exhibit "A," reveals that the Defendants' assertion is baseless. The retraction letter specifically referred to the terms and allegations that Defendants' employed in their publication, leaving no ambiguity as to the false and defamatory statements. Defendants simply chose, however, to ignore the retraction demand.

Furthermore, inasmuch as the purpose of requiring a specific statement of the false and defamatory material is to identify to the publisher which statements are defamatory so that the publisher can address its retraction to those statements, Defendants' attempt to dismiss the Amended Complaint for lack of specificity rings hollow. See *Cook*, 582 So.2d at 39. If the Defendants had any intention of retracting their statements upon receipt of the notice, one might reasonably have expected them to have requested a clarification of the specific statements that apparently they found too vague. But since Defendants completely ignored the retraction demand, they cannot be heard to claim lack of specificity at this juncture.

Defendants' Motion to Dismiss on this ground must be denied.

C. The Amended Complaint States Causes of Action for Libel Based on Defendants' Malicious Publication of False Statements That Defamed Montiel Davis, Regardless of Whether They Are Characterized as "Fact" or "Opinion."

In another ground for dismissal that Defendants did not brief in their Memorandum of Law, Defendants again misleadingly assert that the Amended Complaint should be dismissed for a reason that is unsupported by legal precedent. Defendants claim that "[t]he Amended Complaint fails to state a cause of action to the degree it is intended to address statements of opinion and not false statements of verifiable fact." Motion at ¶ 3. Though prior Florida case law suggested the distinction between "fact" and "opinion" may be meaningful,[2] the U.S. Supreme Court has recently squarely held otherwise, and therefore the Amended Complaint states a cause of action regardless of whether the statements that defamed Montiel Davis are labelled "fact" or "opinion."

The U.S. Supreme Court addressed the legal distinction between statements of fact and opinion in *Milkovich* and "were not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." 110 S. Ct. at 2707. The Court reasoned that an opinion exemption, besides being contrary to the "tenor and context" of prior precedent,

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2. See, e.g., *Zambrano v. Devanesan*, 484 So.2d 603, 606 (Fla. 4th DCA), *reh'g and cert. denied*, 494 So.2d 1150 (Fla. 1936) ("[T]he law recognizes that some comments may be pure expressions of opinion whereas others may be mixed expressions of opinion.")

"would also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 2705. After further elaboration, the Court concluded that existing constitutional doctrine is adequate to protect free expression "without the creation of an artificial dichotomy between 'opinion' and fact." *Id.* at 2706.

The Court then summarized its jurisprudence with respect to actionable opinions, stating first that *Hepps* requires that statements on matters of public concern must contain "provably false factual connotations" before they are actionable against a media defendant. *Id.* Another line of cases stands for the proposition that statements that cannot reasonably be interpreted as stating actual facts ("rhetorical hyperbole") about an individual are not actionable. *Id.* (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 879 (1988)). Finally, the actual malice requirement of *New York Times*, *Butts*, and *Gertz* ensures that speech relating to matters of public concern will remain "uninhibited, robust, and wide-open," since publishers cannot be held liable for statements on matters of public concern that reasonably imply false and defamatory facts regarding public figures or officials without the proper showing of intent. *Id.* at 2706-07.

Against this backdrop, Defendants' contention that the Amended Complaint should be dismissed to the extent that it addresses statements of opinion hardly requires a response. See Motion at ¶ 3. The question of Defendants' liability turns not on whether their statements were opinion, but whether the statements contain "provably false factual connotations." *Milkovich*, 110 S. Ct. at 2706. Under the Supreme Court's precedents, the only instance in which Defendants would not be subject to liability upon adequate pleading and proof is where

their statements could not reasonably be interpreted as stating actual facts about Montiel Davis. *Falwell*, 485 U.S. at 50, 108 S. Ct. at 879. But as the *Ford* court stated, "[i]f a publication reasonably asserts a factual charge which is defamatory, even in a humorous or satirical vein, we are unaware of any first amendment protection." 562 So.2d at 735.

The Defendants' defamatory statements contain assertions that, reasonably interpreted, contain provably false facts and factual connotations. The Defendants asserted that Montiel Davis was a supporter of ideas, persons, and entities of which and whom she has never been a supporter. See Amended Complaint (Composite Exhibit "B"). They stated these facts in an objective manner and stated that, "as we receive these documents and we verify them, we publish them for the information of the voters." See Amended Complaint (Composite Exhibit "B," translation of October 1 edition of *La Verdad*). In determining whether the statements contain actionable factual assertions, "the court must consider the context in which the statement was published, the medium by which it was disseminated, and the recipient audience." *Ford*, 562 So.2d at 735. Given the context (congressional campaign), the medium (front page of a newspaper widely disseminated in the Cuban community), and the recipient audience (hostile to perceived political enemies), it is clear that Defendants had a strong motive to lead their readers to believe that what they printed about Montiel Davis was true, not "rhetorical hyperbole." They cannot now be heard to argue that their statements were mere statements of opinion without factual content.

Defendants' Motion to Dismiss must be denied on the ground that their statements were mere "opinion."

D. The Amended Complaint Pleads Facts Sufficient to State a Cause of Action for Libel Against Defendants.

Without belaboring the point any further, the foregoing has made abundantly clear that Montiel Davis has stated a cause of action for libel. The Amended Complaint adequately pleads facts that, when proved, will establish the statements' falsity and Defendants' malice, see Part I, as well as common law defamation. Part III.A, B. The court is merely reminded that on a motion to dismiss, the court must take as true all well-pled allegations of the complaint. *Florida Medical Center*, 568 So.2d at 458-59.

The Defendants' motion to dismiss on this ground must be denied.

E. The Amended Complaint States a Cause of Action for Libel Against Defendants Because It Properly Alleges Defamatory Statements of Fact.

Here, too, little could be added that has not already been said above. See Part III.B. It should be noted, however, that it would be inappropriate to decide the issue of defamation as a matter of law on a motion to dismiss. Except where a publication can bear only one meaning, a statement that is ambiguous and reasonably susceptible of a defamatory meaning is for the trier of fact to decide. See *McIver v. Tallahassee Democrat, Inc.*, 489 So.2d 793, 794 (Fla. 1st DCA), *rev. denied*, 500 So.2d 544 (Fla. 1986); *Perry*, 464 So.2d at 666. All of the statements that Montiel Davis has alleged in the Amended Complaint are reasonably susceptible of a defamatory meaning and should go to the jury. Therefore, the Motion to Dismiss must be denied.

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F. There Is No News Privilege Under the Florida Constitution, the United States Constitution, or Common Law That Bars the Amended Complaint.

As argued at length in Part I, *supra*, there is no privilege under the United States Constitution that exempts Defendants from this suit. Moreover, Defendants have not argued that any privilege under the Florida Constitution or common law bars this suit, and Plaintiff is unaware of any. The Motion to Dismiss must be denied on this ground.

G. The Amended Complaint Properly Pleads a Claim for Punitive Damages Under Florida Statute § 768.72.

Montiel Davis' claim for punitive damages should not be dismissed or struck because punitive damages are permitted in Florida intentional tort cases in which malice is an essential element of the tort, and Florida Statute 768.72 provides no basis to dismiss or strike the claim. See Part II, *supra*. The motion to dismiss or strike the claim must be denied.

Appendix B

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss must be denied.

DATED: this 14th day of October, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to Richard J. Ovelmen, Esq. at Baker & McKenzie, Suite 1600, Barnett Tower, 701 Brickell Avenue, Miami, Florida, 33131 on this 14th day of October, 1994.

s/ Ira J. Kurzban
IRA J. KURZBAN, ESQ.

APPENDIX C—DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FILED OCTOBER 12, 1994

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGNA MONTIEL DAVIS,

Plaintiff,

versus

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO D/B/A "LA VERDAD,"

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants, Marieta Fandino, Hilda Inclan, and Marieta Fandino d/b/a "La Verdad", submit this memorandum of law in support of their motion to dismiss the Amended Complaint. The motion should be granted because (i) as a matter of federal constitutional law the statements sued upon are expression protected by the First Amendment and are therefore not actionable; (ii) even were the statements actionable, the Complaint fails to allege facts which if proven would establish the essential elements of a libel suit by a "public figure" against a media defendant regarding matters of legitimate public concern; and (iii) no evidence has been submitted or proffered which would justify an award of punitive damages.

Appendix C

Statement of Relevant Factual Allegations[1]

The Spanish language weekly newspaper *La Verdad* is alleged to have published on September 24, 1992 and October 1, 1992[2] political opinion columns in Spanish which the Amended Complaint claims state that Montiel Davis "was a supporter of Fidel Castro ('Castrista')" and that she "represents the interests of Fidel Castro in the United States" (Amended Complaint, ¶ 18, ¶ 20, Composite Exhibit B.)

On September 30, 1992, Plaintiff's counsel sent Defendants a retraction demand pursuant to Section 770.01 which purported to identify the specific statements in these two publications which are false and defamatory. (Amended Complaint, Composite Exhibit A).

Despite the length and verbosity of the Amended Complaint, it pleads only the legal conclusion that Defendants published these allegedly defamatory statements with "actual malice," that is with "knowledge of their falsity or reckless disregard of the truth." No facts are plead which if proven would establish this essential legal element of a public figure libel suit against a media defendant. These conclusory allegations in their entirety are:

> 19. The Defendant made the statements with actual malice and knowledge that their

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1. Since this is a memorandum in support of a motion to dismiss, the factual allegations of the Amended Complaint are assumed *arguendo*, for the purposes of this Motion only, to be correct.

2. Defendants note the original complaint included a September 17, 1992 publication in *La Verdade* in its composite Exhibit B, but no claim has been asserted as to this publication.

statements would be perceived by the Cuban community, under the circumstances under which they were made, in the context in which they were made by Defendants, and in their totality, as allegations of fact that Montiel Davis had membership in organizations and well-defined political affiliations and beliefs, contrary to the Cuban community, and that the statements were false or with reckless disregard as to their truthfulness.

* * *

21. That the statements made by Defendants labeling Montiel Davis a "Castrista," and a representative of Castro in the United States, were made with express malice and knowledge that the statements were false or with reckless disregard as to their truthfulness and with the primary motive to injure Montiel Davis, rather than the conduct news reporting or protect any proper interest, knowing that in the medium and circumstances in which it was disseminated its audience would perceive such publication as statements of fact.

ARGUMENT

A candidate for public office is a "public figure" under controlling decisions of the United States Supreme Court, and publications concerning political candidates are the most highly

protected of all political expression. The First Amendment guarantees that such political speech is free to be vituperative, vehement, rhetorical, hyperbolic, and caustic. Expression such as that sued upon here is thus not actionable.

Even were this not the case, a "public figure" libel plaintiff in a suit against the media involving expression of public concern must plead and prove with clear and convincing evidence the statements published are "of an concerning" her, are false, defamatory, and were published with knowledge of their falsity or with serious doubts as to their truth.

The pleading requirements of Florida law mandate that a complaint at least allege facts which if proven would establish each element of the tort. The pleading of mere legal conclusions is not sufficient. The Amended Complaint fails to allege any facts which if proven would establish falsity or knowledge of falsity. It does no more than plead these conclusions.

Finally, the Amended Complaint does not proffer evidence or any factual basis to support the pleading of a claim for punitive damages.

A. The Statements Sued Upon Are Not Actionable Under The First Amendment.

Expression concerning candidates for political office is the speech most highly protected by the First Amendment. Political debate is to be "wide-open and robust;" and criticism of candidates for public office is expected to be "caustic, vituperative, and rife with rhetorical hyperbole or vigorous epithet". *Milkovich v. Lorain Journal Co.*, 497 U.S. 16-17 (1990); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Letter*

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Carriers v. Austin, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970); *Ocala Star-Banner Company v. Damron*, 401 U.S. 295 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

In *Milkovich*, the Supreme Court explained that for a public figure to state a claim for libel against a media defendant for publishing expression relating to a matter of public concern, the plaintiff must, among other things, plead and prove a false statement of fact. Expressions of opinion which do not amount to statements of verifiable fact are not actionable. The Court also noted that statements of rhetorical hyperbole common to political campaigns have long been ruled to be not actionable. In fact, the Court expressly held that statements far more extreme than those which are sued upon here are not actionable:

> Foremost, we think Heeps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant in involved. ***Thus, unlike the statement, "In my opinion Mayor Jones is a liar," the statement, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," would not be actionable.*** Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provable false factual connotation will receive full constitutional protection.

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> Next, the Bresler-Letter Carriers-Falwell line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. *Falwell*, 485 U.S., at 50, 99 L Ed 2d 41, 108 Ct. 876. This provides assurances that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation. See id., at 53-55, 99 L Ed 2d 41, 108 S Ct 876.

497 U.S. 19-20. (Emphasis Added)

In short, had Defendants stated that the Plaintiff should be defeated in her election because she is an out-and-out Marxist, the publication still would not be actionable.

As *Milkovich* explains, this result follows from a long line of Supreme Court decisions highly protective of defamatory political speech. In *Greenbelt Cooperative Publixhing Assoc.*, *supra*, the Court held that accusing a public official of "blackmail" was not actionable, but rather was no more than vigorous epithet used to charactize his negotiating tactics. In *Letter Carriers v. Aust, supra,* use of the term "traitors" to refer to nonunion workers was held not actionable. In *Hustler, supra,* a political cartoon suggesting the plaintiff's first sexual experience was the act of incest with his mother in an outhouse was not actionable.

The statements sued upon here clearly fall within the ambit of protection afforded political speech by the First Amendment. The articles does no more than state in hyperbolic terms that the

plaintiff's views in the author's opinion are much too sympathetic to the Castro regime. The Amended Complaint must be dismissed.

B. The Amended Complaint Fails to Allege Any Facts Which If Proven Would Establish The Articles Were False or Published With Knowledge Of Their Falsity.

Under controlling decisions of the United States Supreme Court, a candidate for public office is a "public figure" libel plaintiff. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Ocala Star-Banner Company v. Damron*, 401 U.S. 295 (1971). As the Court in *Monitor Patriot* held:

> This case went to the jury in December 1966, after our decisions in New York Times and Garrison, but before Curtis and Greenbelt. The trial judge instructed the jury that Roy, as a candidate for elective public office, was a "public official," and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a "public figure," if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case in concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office. That New York

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> Times itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law. And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484, 1 L Ed 2d 1498, 1506, 77 S Ct 1304, then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

The burden of proof on a public figure libel plaintiff is heavy indeed. She must plead and prove facts demonstrating that the allegedly actionable statements are of and concerning her, are false, are defamatory, and were published with knowledge of their falsity or reckless disregard of their truth or falsity. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991); *Milkovich, supra; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). As *Masson, supra*, summarized the law:

> The First Amendment limits California's libel law in various respects. When, as here the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with "knowledge that it

was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S.254, 279-280, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author "in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), or acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964).

Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. See *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputations and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phase may be an unfortunate one. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, n. 7, 109 S.Ct. 2678, 2685, n. 7 105 L.Ed. 2d 562 (1989). In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This

> definition principle must be remembered in the case before us.

111 S.Ct. at 2429-30.

The pleading requirements of Florida law include the obligation to plead facts which if proven would establish each essential element of the cause of action. *Chris Craft Industries, Inc. v. Van Valkenburg*,267 So. 2d 642 (Fla. 1972); *Ellison v. City of Fort Lauderdale*, 175 So.2d 198 (Fla. 1965); *Rios v. McDermott, Will & Emery*, 613 So.2d 544 (Fla. 3d DCA 1993); *Arky, Freed, et al. v. Bowman Instrument*, 527 So.2d 211 (Fla. 3d DCA 1987); *Bliss v. Carmone*, 418 So.2d 1017 (Fla. 3d DCA 1982), *Clark v. Boeing*, 395 So.2d 1226 (Fla. 3d DCA 1981).

The Third District explained the rule succinctly in dismissing a products liability claim which did no more than plead the legal conclusion that the product was defective and unreasonably dangerous for its intended use:

> Pleadings must contain ultimate facts supporting each element of the cause of action. *Woodcock v. Wilcox*, 98 Fla. 14, 122 So. 789 (1929). Mere conclusions are insufficient. *Maiden v. Carter*, 234 So. 2d 168 (Fla. 1st DCA 1970). The amended complaint fails to plead ultimate facts establishing the elements of strict liability, that is, that the product was defectively designed or unreasonably unsafe for its intended use when it left the manufacturer.
>
> "It is not itself a breach of duty to supply

> materials which are reasonably safe and customarily used, even though the material might conceivably be made more safe, nor must the manufacturer make his product 'more' safe when the danger to be avoided is obvious to all." See *Evans v. General Motors Corporation*, 359 F.2d 822 (7th Cir. 1966); *Campo v. Scofield*, 301 N.Y. 468, 95 N.E. 2d 802 (1950).
>
> *Royal v. Black and Decker Manufacturing Co.*, 205 So. 2d 307, 310 (Fla. 3d DCA), *cert. denied*, 211 So. 2d 214 (Fla. 1968) (footnote omitted). The claim that defects in the engine or aircraft were the proximate cause of appellant's multiple sclerosis appears only as a conclusion and not through well-plead allegations.

Clark, supra, at 1229.

Similarly, in *Price v. Morgan*, 436 So. 2d 1116 (Fla. 5th DCA 1983), the Court affirmed the dismissal of a complaint which plead the legal conclusion of wanton or willful conduct, but failed to allege facts which if proven would establish the element:

> We recognize our obligation to consider as true all well-pleaded allegations so the complaint in considering an order on a motion to dismiss. Nevertheless, a pleading is insufficient if it contains merely conclusions as opposed to ultimate facts supporting each element of the cause of action. *Clark v.*

> *Boeing Co.*, 395 So. 2d 1226 (Fla. 3d DCA 1981). Appellant failed to allege any ultimate facts demonstrating any wanton negligence or wilful conduct of appellee subsequent to the arrival of the firemen on the scene, nor did she allege any opportunity to warn upon arrival of the firemen or any facts, such as those found in *Hall v. Holton*, whereby the presence of the fireman upon the premises could have been anticipated prior to the fire. The trial court was thus correct in dismissing the fourth amended complaint.

Id. at 1121-1122.

This basic rule of pleading has been applied as it must, to dismiss libel complaints which fail to allege facts which must be proven to establish elements of the claim. As the court in *Frieder v. Prince*, 308 So.2d 132, 134 (Fla. 3d DCA 1975), stated in affirming the granting of a motion to dismiss a defamation suit:

> We think the complaint filed by Frieder in this case fails to set forth facts which are legally sufficient to establish actual malice.

Or as the Florida Supreme Court held forty years ago in affirming the dismissal of a complaint in a libel suit:

> The conclusions of the pleader to the effect that the article complained of was false and defamatory is not controlling.

Cooper v. Miami Herald Publishing Co., 31 So.2d 383, 384 (Fla. 1947). Or as Judge Letts trenchantly noted:

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> Since such actual knowledge or reckless disregard must be proved, it follows that one or both must also be *specifically alleged.* Examination of the complaint before us reveals no such allegations except for the lone statement that the publication was "malicious." This is clearly insufficient under the law of *Gertz* which mandates our adherence.

Bianco v. Palm Beach Newspapers, Inc., 381 So. 2d 371, 372-73 (Fla. 4th DCA 1980) (emphasis added). See also, *Rishel v. Eastern Airlines, Inc.*, 466 So. 2d 1136 (Fla. 3d DCA 1985).

The Amended Complaint contains no allegations which if proven would establish the statements published are false. The Amended Complaint likewise contains no factual allegations which if proven would establish that Defendant know the statement sued upon are false, or entertained serious doubts as to their truth when they published this. Thus, the Complaint should be dismissed.

C. The Claim For Punitive Damages Must Be Dismissed Because No Evidence Has Been Proffered Which Would Provide A Reasonable Basis For Its Recovery.

Under Florida law, a plaintiff must either make an evidentiary showing, or a proffer of evidence, which would provide a reasonable basis for recovery of punitive damages, in order to include such a claim in the complaint. Section 768.72. Florida Statutes. The law provides:

> In any civil action, no claim for punitive

> damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery for such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages to permitted.

Where a plaintiff fails to make the requisite evidentiary showing or proffer, the claim must be struck or dismissed *Key West Convalescent Center, Inc. v. Doherty,* 619 So. 2d 367 (Fla. 3d DCA 1993). *Carroll v. Magnaflux Corp.*, 460 So. 2d 991 (Fla. 4th DCA 1984). As the *Carroll* court explained:

> In Count V appellant attempts to state a cause of action for punitive damages against all of the defendants named in his Fifth Amended Complaint. We find the allegations of Count V vague, ambiguous, and indefinite. First, the most liberal reading of Count V fails to disclose which allegations, if any, appellant intended to assert against appellees. Second appellant's allegations that "the Defendants" (referring to all defendants named in the Fifth Amended Complaint)

> wilfully, wantonly and with malice, moral turpitude or reckless indifference acted to cause the injury to appellant cannot, absent allegations of supporting ultimate facts, convert his negligence claim to a cause of action for punitive damages.
>
> > The use of the descriptive words "willful, wanton or reckless" is not sufficient to state a case entitling recovery of exemplary of punitive damages. . . . In order to recovery exemplary damages, the complaint must allege some general facts and circumstances of fraud, malice, gross negligence, or oppression. *Winn & Lovett Grocery Co. v. Lrcher*, 1936, 126 Fla. 308, 171 So.214. Adjective employed to label an act are of themselves insufficient to support a claim of gross negligence and are in fact unnecessary.
>
> *Rice v. Clement*, 184 So.2d 678, 680 (Fla. 4th DCA 1966). We hold the allegations of Count V insufficient to state a cause of action for punitive damages against appellees.

Since the Amended Complaint proffers no evidence establishing actual malice and express malice, both of which are required to obtain punitive damages in a Florida public figure libel suit, the punitive damages claim should be struck or dismissed.

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Conclusion

For the foregoing reasons the motion to dismiss should be granted.

Respectfully submitted,

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By: s/ Richard J. Ovelmen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by hand this 12th day of October, 1994 upon:

Ira J. Kurzban, Esq.
Kurzban Kurzban & Weinger, P.A.
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s/ Richard J. Ovelmen

APPENDIX D — TRANSCRIPT OF PROCEEDINGS DATED OCTOBER 19, 1994

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA GENERAL JURISDICTION DIVISION

CASE NO. 92-22382

MAGNA MONTIEL DAVIS,

Plaintiff,

vs.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a "LA VERDAD",

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE MURRAY GOLDMAN

Dade County Courthouse
73 West Flagler Street
Dade County, Florida

Wednesday, October 19, 1994
3:40 p.m.

[2] APPEARANCES

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- - - - -

[3] MR. KURZBAN: My name is Ira Kurzban. I'm the attorney for Magna Davis. I'm with the firm Kurzban, Kurzban & Weinger, and with me is Brian Torres, who has passed the bar but is not yet admitted, but worked on this.

MR. OVELMEN: My name is Richard Ovelmen I'm the attorney for the defendants. I'm with Baker and McKenzie.

THE COURT: Shall we proceed?

MR. OVELMEN: Yes, sir. We're here on the defendant's motion to dismiss. The basis for the motion is really three-fold.

First, we point out that under controlling United States

Supreme Court precedent, the speech here is protected. We do not claim some kind of blanket exemption for political speech. What we are saying is that speech that involves political judgements, that is, speech that is not subject to a verification of facts, but asserts opinion, asserts political statements, that kind of speech is protected, and is protected under a long line of cases which we cite in our memorandum.

THE COURT: Which I've never seen.

[4] MR. OVELMEN: You've never seen our memorandum?

THE COURT: No. Mr. Kurzban's was given to me about an hour and a half ago.

MR. OVELMEN: Ours was served quite some time —

MR. KURZBAN: Your Honor, it says October 14, admitted.

THE COURT: You filed it downstairs.

MR. KURZBAN: Yes.

THE COURT: You anticipated that the clerk would bring it up to me, but that's not a good anticipation.

MR. KURZBAN: Do you want —

THE COURT: I've got yours.

MR. KURZBAN: Do you want to reschedule?

THE COURT: No. I read yours, but I haven't read Mr. Ovelmen's.

MR. OVELMEN: Ours was a responsive memorandum that was served and filed October 12.

THE COURT: They're a good month behind downstairs. Do you have a copy for me?

MR. OVELMEN: Yes.

[5] MR. PANTIN: Yes, we do, Your Honor.

MR. OVELMEN: Well, okay. Let's start at the beginning, then, very quickly.

What the complaint alleges is that Magda Davis, who is the plaintiff, has been libeled in two respects: One, that she's been denominated a Castroisto, pro-Castro, or Castro supporter, and second, in a very similar, but a little longer formulation, that she represents or serves the interests of Castro in the United States. Those are the actionable — they are embedded in several — two statements of opinion columns or news articles. We consider them opinion pieces, written by one of the defendants, Hilda Inclan.

In any event, our major argument, our principle argument, is that under the Milkovich, Hustler, Letter Carrier, Greenbelt, Ocala Star Banner line of Supreme Court cases, whether someone is pro-Castro or a Castro sympathizer or can be said to represent the interests of Castro, that involves a political judgment, and a political judgment or political expression of [6] that kind, which is not the same as saying, asserting a proposition of fact, is protected under the first amendment.

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Let me draw that distinction very carefully for the Court. If, for example, you're running for office and you say of your opponent that he stole $50,000, that's political speech, but it's not protected because it asserts a verifiable fact. If you say that your opponent suffers from a loathsome disease or is unchaste, that is, your opponent is having affairs with specific women, those are statements of fact. They are subject to verification and they are suable on. But what the Supreme Court cases address are situations such as where you call your opponent a traitor, where you call your — and the Court has said it's just not actionable; that is an expression of opinion, a value judgment.

Where you say that your opponent is blackmailing somebody, or in the leading case, which is Milkovich versus Lorain Journal, the Court said very specifically — in fact, let me give Your Honor the case. [7] This is the most recent U.S. Supreme Court.

If the Court will look at page 2706, the highlighted portion, it says: "Foremost, we think Hepps" — now, by Hepps, they're referring to the earlier decision of Philadelphia Newspapers versus Hepps which says — well, it says, "We think Hepps stands for the proposition that a statement — a statement on matters of public concern must be provable as false before there can be liability under state defamation law at least in situations, like the present, where a media defendant is involved. Thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable."

Now, what they're really saying here is that we published a statement that says oppose Magna Davis because she shows her

abysmal ignorance by following the teachings or supporting Fidel Castro. And what the Court is saying is whether or not somebody follows the teachings of Marx and Lenin, [8] that's a political judgment. Whether or not it's bad, whether it's even —

THE COURT: Let me interrupt you.

MR. OVELMEN: Yes.

THE COURT: We have to look at all of these things in their context.

MR. OVELMEN: That's correct.

THE COURT: Mr. Kurzban spent five pages in the complaint setting out the particular situation that exists.

MR. OVELMEN: Yes, sir.

THE COURT: Whereas if you lived in Muncy, Indiana or Des Moines, Iowa and you said to somebody, well, he's real bad because he likes Castro, that would get you a doughnut maybe. You know, passing in the street, nobody would pay any attention. But if you go on Southwest 8th Street and point to him and say he supports Castro, he might be dead in three minutes.

MR. OVELMEN: But the point —

THE COURT: That's the allegation.

MR. OVELMEN: That may all be truth. Believe me, if you — I'm from Indiana —

THE COURT: I picked the wrong place.

[9] MR. OVELMEN: If you said La Porte, Indiana, somebody is communist or Marxist, they wouldn't like you either, but that's not the point. The point is not whether it's injurious to your reputation. The point isn't whether people will hate you because of it. The point is whether that statement is an actionable statement.

In other words, the point, is that a statement like he stole $50,000, it's susceptible to verification. Or is it a political judgment that we protect?

And what the Supreme Court is saying is that when you attack a candidate because you say, you know, he's Marxist or he shows his ignorance by being a follower of Lenin or something, well, that's horrible things to say about him and in this community it would be very, you know, damaging to their reputation if taken, you know, at face value.

The fact is, it is not the kind of statement that we allow a libel suit on. And they cite no case from any court, other than a 1953 case decided 20 years before this [10] entire doctrine — their only case. They don't cite any U.S. Supreme Court case that allows a lawsuit on a political judgment case or where someone has said someone is a Marxist or fascist or anything. They have no cases. There are no cases. The only case they can cite as case decided in 1953.

Now, this doctrine developed post-1964. I have a U.S. Supreme Court case that says that if you call somebody a Marxist and say they're an idiot and you should not vote for them because they are a Marxist, that's not actionable, and the reason for that is

that whether someone is pro-Castro, whether they're pro-communist or whether they're a Marxist or not is the kind of statement that is not susceptible to empirical verification. It is the kind of expression that is protected. And we have other cases as well.

I mean, in addition to the blackmail case and the traitor case, we have the case of Hustler, where the argument was made there that, of course, it's highly defamatory to assert that your first sexual experience was [11] incest with your mother, but the Court said that's not actionable in the context of a cartoon lampooning, you know, Jerry Falwell.

The issue here is not whether people in South Florida take umbrage at that. The issue is whether it's the kind of statement that you can verify in the same way you can verify someone stealing $20,000 or how many seats are there in the Orange Bowl or something like that. Whether she is too pro-Castro for our taste is a question of taste. Whether because of her marriage to Mr. Kurzban and his activities and her statement that she opposes everything Ileana Ros-Lehtinen stands for makes her someone who is too much in favor of Castro for the voters in Dade County, that is an issue for them to decide.

THE COURT: Does the issue of malice enter into this at all?

MR. OVELMEN: Yes. That's our next argument.

So the first argument is simply whether the expression at all is the kind of expression that is protected, and our point [12] is that it is, and we have a case in the U.S. Supreme Court, fortunately, that provides the essence of what their claiming here, is that statement. And we have others that are are better. Traitor, blackmailer, etcetera.

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Now, our second argument is that, look, this person is a public figure. The law is black letter that a candidate for public office is a public figure. They don't dispute that. Everyone acknowledges it. If you're a public figure, that means you have to prove a number of things. Among the things you have to prove are actual malice as the constitutional doctrine developed and falsity, and a lot of people don't realize that you have to prove both things. The Hepps case that we made earlier reference to, decided the issue once and for all, and it's been reacknowledged, reaaffirmed in Milkovich, that a public figure plaintiff must prove the statements are false. Actual malice requires that you prove that when I published a statement, I knew it to be false, or that I had reckless disregard. But reckless disregard is not an objective — I [13] mean is not a reasonable man standard. Objective — excuse me, Your Honor. Wreckless disregard means that there was a high subjective awareness of falsity; in other words, it is a scienter test that requires the Court to say that you prove there were serious doubts at the time of publication.

THE COURT: But hasn't he alleged that?

MR. OVELMEN: I'll get to that. That's my argument.

My argument is that under Florida law you must prove — I mean you must plead —Florida pleading law, and we cite many cases — you must plead facts which, if proven, would make out each of the elements of the claim. One element is falsity. So you have to plead facts which are proven which show the statements are false.

Another element is actual malice, which is that they knew when they published this it was false or they had — they, in fact, entertained serious doubt when they published it, okay.

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Our point is very simple. They have not [14] pled any facts which have proven true which show the statements are false, nor have they pled any facts which, if proven true, would show there was serious doubts or actual knowledge of falsity.

For example, what would that look like? Well, suppose six years ago she told — Magda Davis told Hilda Inclan, "I really am very much against Fidel Castro and I've done the following 16 things." Let's say Hilda Inclan told somebody, "Gee, we don't believe the story at all. You know, blah, blah, blah. And we're just doing it for other reasons." There are no allegations of any kind as to actual malice in the complaint other than the conclusion, pleading the legal conclusion, they published with actual malice. That's it.

As to falsity, there are no allegations as to falsity in the entire complaint — it's got all this stuff — except the allegation the statements published are false.

Now, why is that? Well, if you remember back to our first argument, our first argument was well, whether you're pro-Castro [15] or not or you support Castro or not, that's really an opinion. That's a judgment. It's a political thing. Of course, if that's the case, there aren't going to be any facts that you can plead that show it to be false or true, for that matter, and, of course, as far as actual malice goes, what are the facts going to be, that people didn't believe it?

I mean, let's face it. After Magda Davis kissed Castro and said he's a great teacher, and that's all disseminated in the press, my clients believe it more today than they ever — I mean, how could you ever prove actual malice in a case like this?

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Well, we are not saying today they have to prove it. All we are saying is, under Florida law we are a state that requires that ultimate facts be pled for each element, for each element, and all we're asking is, well, what are the facts that, if you prove them, show that our people entertained serious doubts. And what are the facts? If you plead them and you prove them, what are the facts that show that these statements are false. That's all. Just tell us what they [16] are. You know, we have a right to be on notice as to what that stuff is.

Now, they say, well, you know, there's a case like Herbert v. Lando which says you can conduct discovery. And they say, gee, they must not know about that. Well, I wrote the principal brief in Herbert v. Lando. I know Herbert v. Lando very well. What Herbert v. Lando said is that there's no absolute privilege for the editorial process. It doesn't say that if a state requires fact pleading as to each element, you're excused from that. It simply says that you can't raise as an absolute privilege, you know, editorial activities. I mean, Herbert v. Lando is apropos of nothing here. Believe me, I'm in a position to know what it's apropos of.

Another thing they raise, and this is really our third argument, is that there is no cause of action for libel per se in Florida. There are — and I'll hand the Court a case or two on that, because it's really a verbalism that they're playing on.

The leading case is Mid-Florida [17] Television versus Boyles, another case in which I wrote the briefs for some major players.

If the Court were to look at the highlighted portion, first under Roman Numeral 1, the opinion says: The issue for review is

whether Gertz has abrogated a cause of action for libel per se brought by a private person against a media defendant. Undoubtedly the distinction between libel per se and libel per quod, once clear, has blurred. At common law, before Gertz, we said 'words amounting to a libel per se necessarily import damage and malice in legal contemplation, so these elements need not be pleaded or proved, as they are conclusively presumed as a matter of law.'"

I would add there was a third presumption. They were called the three galloping presumptions of libel per se. The third presumption was falsity. So what you used to be able to do is presume damage, malice and falsity under the common law for libel per se. That was the cause of action for libel per se. All you had to do was [18] plead that the statement was made and published and it was of and concerning the defendant, and then you got the benefit of these three presumptions, two of which are mentioned in this opinion. The third one wasn't relevant. And I'll explain why in a minute, too. In any event, those were the three galloping presumptions.

The Court then goes to to say: "This statement is no longer accurate regarding a libel action against the media. Nonetheless, for purposes of pleading in a negligence action against the media, labeling an action libel per se remains a useful shorthand for giving a media defendant notice that the plaintiff is relying upon the words sued upon as facially defamatory and, therefore, actionable without resort to innuendo."

What does that mean? That's very simple. There are two kids — in any libel suit one of the elements is defamation. If the Court wants to look at Justice Erhlich's concurrence, he explains what's going on.

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What he says is, "The distinction between libel per se and per quod has not [19] 'blurred.' Libel per se is dead, and let no one read from this decision that this ghost which we find still persists lingers in any form other than as a shorthand term. To avoid confusion, in my opinion, any attorney would be well-advised when drafting a libel complaint to avoid the use," blah, blah, blah.

Our only point is this: Subsequent to this case, Hepps came down and Hepps said you have to prove falsity as well. It eliminated the third of the galloping presumptions.

What's left, then, of defamation per se or libel per se? Well, the cause of action, libel per se, where you got to presume malice, you got to presume falsity and you got to presume damage, that's gone. That's gone against the media. There is no such cause of action. However, the element of libel in which you say is a statement defamatory, is it injurious to someone's reputation, there is still that element as to whether or not the defamation goes on its face or requires an extrinsic fact, and I'll explain that.

[20] THE COURT: You better do it quick.

MR. OVELMEN: For example, if I say that my colleague, Mr. Pantin, has a loathsome disease, that's defamation per se. All it means is that that statement is defamatory on its face. I still have to, as my cause of action, I still have to prove, then, in a case against the media, I still have to prove falsity, I still have to prove the damage and I still have to prove the malice. But another statement might be, I saw Mr. Pantin with a young woman, and it turns out you happen to know the young woman is married, and that's extrinsic. You know, that's not on the face. That's per quod. All right.

Well, that distinction remains in the law. There's a difference between statements that are defamatory per se and defamatory per quod. But the cause of action, libel per se, that's dead. I mean against the media. You can't have a presumption of the other elements anymore, and that's the law.

Now, what we are saying is — that's all we are saying. We're saying that they haven't proved — I mean they haven't pled. [21] They haven't pled any facts which show malice or falsity. They simply have alleged legal conclusions, and I've cited many cases in my memorandum that say that's not good enough.

And they cite on the other side, for example, Perry versus Cosgrove as one of their important cases on the other side, but if the Court will take a look at that authority, if the Court would note the footnote that has apparently been overlooked, it explains that this is not a case involving a "media defendant" because the material sued upon was never published by the media, although it appears on its face or at first blush, unless you read the footnote, to be a case against the media. It's not a case against the media because it was not a publication.

Now, that's their leading authority in opposition to us. Our cases, of course, are the standard Florida cases that require pleading of facts to establish elements. And there's a practical reason for that, Your Honor, because if they don't have any facts which show actual malice and they don't have [22] any facts which show — which if they plead them and can prove them, if they don't have any facts that show falsity, we are going to be putting the parties to an incredible amount of expense for no reason.

One of the cases we rely on heavily is a Third District Court

of Appeal case on a libel suit on a dismissal in which the Court said that, you know, they didn't plead facts which, if proven, would show the malice and, therefore, the case — you know, the complaint was properly dismissed. If I can hand it to the Court. Frieder v. Prince, which is precisely the holding of that case.

They have no cases that say that, gee, all you have to do is plead legal conclusions. And that's our point on that, and we think that under the circumstances here, we are entitled to, you know, our dismissal.

One last point, Your Honor. We believe for the same reasons, the punitive damage claim should be struck.

THE COURT: Well, you don't have to go into 768.

[23] MR. OVELMEN: Okay.

MR. KURZBAN: May I respond, Your Honor? Thank you.

First of all, I admire Mr. Ovelmen's persistence. Your Honor should be aware of the fact that Mr. Ovelmen has made the exact same arguments here twice now before another judge in the Maldonado case and in the Lagos case, and the judge has denied their motion to dismiss. Virtually the same brief and the same arguments.

And the reasons why Judge Bloom denied their motion to dismiss are the same reasons why you should deny their motion to dismiss today.

First of all, it is not true that these are statements of opinion.

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The Milkovich case that he sites, he miscites, because in Milkovich they specifically say, "In my opinion, X, that the person is a person who is supportive of the teachings of" — in fact, let me read it: "In my opinion, Your Honor, Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin."

[24] Here these were not stated as opinion. The two statements, in fact, very clearly were made in the context, as we pointed out in our brief, were made in the context of them saying that these are statements which we will give you more information on.

The article says: "As we receive these documents and we verify them, we will publish them for the information of the voters."

The statements themselves do not say this is in my opinion, and although counsel now tries to suggest it was in some kind of opinion column, the way the statements were made, they clearly indicated that they were statements of fact.

Both statements state — the first one states that Magda Davis is a supporter of Fidel Castro. The second statement was Montiel Davis represents the interests of Fidel Castro in the United States. Those are statements of fact. They can be verified as to whether or not — the implication obviously is that she's an agent for Fidel Castro in the United States and represent his interests.

[25] There is no case that they cite, by the way, which suggests that when there are statements about a person being a communist and suggesting that they're a communist or communist supporter that there is no cause of action, and though

my colleague seeks to make light of a Supreme Court decision, there is a Florida Supreme Court decision directly on point that says and has held that to accuse someone of being a communist is defamation per se in this state. That decision has never been reversed since 1953 and is the governing law in this state.

So I don't think there is any issue that if you call somebody a communist, it's defamation per se, let alone given the facts that we have alleged here, and I don't have to tell Your Honor — you live in this community and I think what you said before is just common knowledge. One can almost take judicial notice of the fact that saying something like that amounts to defamation in this community.

With respect to the other arguments, I think we have adequately briefed the other [26] arguments. The truth is and the facts are here that we have alleged actual malice. We have alleged that it was a false statement, that with respect to the issue of actual malice, we sent them a letter and asked them to cease and desist and then they published the second statement.

So I think right on the face of the complaint, the fact that we sent them a letter giving them notice under Florida law and telling them to retract it, and then they made the second statement, certainly indicates that there was actual malice here.

They have misstated the law with respect to whether or not we can make inquiries if we have alleged it on its face. The state, as you know, is a pleading state. We do not have to allege the kinds of things they're suggesting. We have alleged that it's a false statement. We have alleged that there was actual malice. We're allowed to conduct discovery based on that. We have alleged facts indicating that it was actual malice because we have

said that after sending them a letter and putting them on notice that this [27] was not true and was a false statement, they issued the second statement saying that Magda Davis represents the interests of Fidel Castro here. So I think with respect to those claims, there's no basis for it.

My colleague also misreads the question of libel per se. There is no case, including that Supreme Court case that they cite, the Florida Supreme Court says — that says that the doctrine of libel per se is abolished. They have only said that you need to allege facts that you didn't need to allege before, that is, you need to now allege actual malice, you need to allege that the statements were false, and we have done that. So, therefore, we have stated a claim for libel per se.

The other argument which apparently, even though they raised in their initial motion to dismiss, they didn't pursue here, but briefly on the question of punitive damages, this is a tort. We have alleged actual malice in the complaint. We have alleged facts supporting actual malice with respect to the —

[28] THE COURT: I'm going to follow 768.

MR. KURZBAN: Okay. Well, I think there obviously is — under 768 here we have alleged what we need to allege—

THE COURT: It's not a matter of allegation. Under 768, it says you have to have an evidentiary hearing at a later point, not necessarily hearing, but at least you have to give depositions, show me something that would reach the level that I would say, okay, you can go to a jury. It doesn't prevent you from taking any discovery you want. Obviously you have to take the discovery to prove your regular case, but it just keeps away the finances. They

don't have to provide their financial records until such time as I would say after a hearing, well, there's enough in these depositions that that wouldn't — that's how I've been doing it in all the cases. That's what I think the guidance there is.

MR. KURZBAN: I think the only difference here is, Your Honor may want to take a look at Florida Statute 770.02, and that's the statute we cited because that's [29] the statute that I think suggests that there is a difference in a libel case as opposed to a regular tort.

THE COURT: If I deny the motion, I'm still going to go under 768, but I haven't had a chance to read Mr. Ovelmen's memo yet.

MR. KURZBAN: Your Honor should keep in mind, as I said initially, that these very simple arguments — you may want to take a look at the briefs in the other cases. The same identical arguments were raised in the two other cases before Judge Bloom and they have been rejected.

THE COURT: Do you want to send this one to Judge Bloom?

MR. KURZBAN: Fine with me. I think they should all be consolidated actually. I don't see the purpose in trying them three times. I mean, if it's the same issue.

MR. OVELMEN: If I may just very briefly respond.

THE COURT: Sure.

MR. OVELMEN: First of all, in Milkovich, I guess it's

possible after all these years I could misstate the law on [30] libel, but I think if somebody says that, they better be careful.

In Milkovich, if the Court would look at page 2705, it addresses the point on whether or not it makes any difference to have the words "In my opinion" or "It's my opinion" or "Our opinion is." And the Court says that that adds nothing to the analysis. Whether you say "in my opinion" or you don't say "in my opinion" doesn't mean anything.

At the bottom of 2705, second column, starts at the last two lines. "If a speaker says, 'In my opinion Mayor Jones is a liar,' he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statute may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to a reputation as the statement, 'Jones is a [31] liar.'

"As Judge Friendly aptly stated, it would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct by simply using explicitly or implicitly the words 'I think.' "

Now, if you turn over to the very next column on that same page, where I read from, what the Court compared was, "Thus, unlike the statement" — this is in the highlighted paragraph — "thus, unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable.'

Obviously, the analysis had nothing to do with whether the words "in my opinion," you know, were used.

The only other comment I would make is on the issue of retraction. There is no case that I'm aware of that holds that refusal to retract is evidence of actual malice. The reason is that actual malice is what you knew [32] at the time you published.

So in the first instance, a retraction demand is after the publication, where in this instance there's a publication both before and after. What the courts have said is that the refusal to retract is evidence that there was no actual malice because it is evidence that the defendant believed his statement to be true, and that's what the law is here, not what — not quite the reverse.

THE COURT: I have one other problem and then I'm going to chase you out of here.

The newspaper articles where the statements are are in Spanish.

MR. KURZBAN: No. They were translated, Your Honor.

THE COURT: Where?

MR. KURZBAN: And they were submitted to the Court.

MR. OVELMEN: We have copies. As a courtesy to the Court we will be happy to give — they are your translations.

MR. KURZBAN: Yes.

THE COURT: I don't have the translations.

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[33] MR. OVELMEN: Why don't you give the Court —

THE COURT: If I have them, I haven't found them.

MR. OVELMEN: That's all right.

THE COURT: I just have these.

MR. OVELMEN: Please give the Court —

THE COURT: Okay. That will be a help. Thank you very much.

MR. OVELMEN: Thank you, Your Honor.

MR. KURZBAN: Thank you.

(Thereupon, the hearing was concluded)

Appendix D

CERTIFICATE OF NOTARY

STATE OF FLORIDA:

SS.

COUNTY OF DADE:

I, THOMAS J. KRESSE, a Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I reported in shorthand the proceedings in the above-styled cause before the Honorable MURRAY GOLDMAN, at the time and place as et forth; that that the foregoing pages, numbered rom 1 to 34, inclusive, constitute a true record.

I further certify that I am not an ttorney or counsel of any of the parties, nor related to any of the parties, nor financially terested in the action.

WITNESS my Hand and Official Seal this 31st day of October, 1994.

Notary Public State of
Florida. My Commission
expires Oct. 12, 1995.

s/ Thomas J. Kresse

(3)

Supreme Court, U.S.
FILED
OCT 24 1995
CLERK

No. 95-152

In The

Supreme Court of the United States

October Term, 1995

MAGDA MONTIEL DAVIS,

Petitioner,

v.

MARIETA FANDINO, HILDA INCLAN, and MARIETA FANDINO d/b/a *LA VERDAD,*

Respondents.

On Petition For Writ Of Certiorari To The Third District Court Of Appeal Of The State Of Florida

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In Respondents' Brief in Opposition ("Resp. Br."), Respondents contend that the Petition for Writ of Certiorari ("Pet.") should be denied because the state courts below correctly applied this Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and that the Questions Presented in the Petition raise "claims and issues" not presented in the state courts below. Resp. Br., 18-30. Respondents are incorrect on both counts.[1]

I. RESPONDENTS' CONTENTION THAT THE QUESTIONS PRESENTED ARE NOT PROPERLY BEFORE THIS COURT IS ERRONEOUS

Contrary to Respondents' assertions, *see* Resp. Br., 27-30, Petitioner Magda Montiel Davis' claim in this litigation, from the trial court to this Court, has always been the same: that the Respondents' defamatory statements that Ms. Davis is a representative of Castro's interests in the United States and a "Castrista" are actionable, consistent with the First Amendment, because the reasonable reader, given the context in which the statements appeared and the audience to whom the publications were directed, would understand those statements to imply provably false assertions of fact. The Amended Complaint makes explicit allegations of this nature. *See* Pet., Appendix ("P. App."), 16 (Amended Complaint,

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[1] Ironically, while Respondents complain that the Petition makes factual arguments based on Respondents' defamatory publications that were not properly raised below, Resp. Br., 27-30, Respondents in a number of places in their Brief in Opposition raise matters *wholly outside the record* in a cheap attempt to prejudice the Court's evaluation of the Petition. *See id.*, 11 n.3, 11-12 n.4. Ms. Davis will ignore the substance of those matters for the purposes of this Reply.

¶¶ 19-21, 32-33). In fact, Count II of the Amended Complaint, in distinction to Count I, stated a claim for libel based upon the contextual meaning of the statements, rather than for their defamatory nature *per se*. *See* P. App., 16-17. Ms. Davis explicitly argued this position in the trial court. *See* Resp. Br., App. ("R. App."), 20a, 21a, 31a (PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS).

The Respondents moved to dismiss the Amended Complaint, relying primarily on *Milkovich*. *See* R. App., 38a-40a. Respondents argued then, as they do now, that under *Milkovich* the sued upon statements do not imply any provably false assertions of fact. *Id*. The trial court agreed, holding under *Milkovich* that "the statement that the Plaintiff is 'pro-Castro' or serves his interests, similarly constitutes an expression of political opinion and judgment which is not actionable." P. App., 4.

Thus, the issue whether Respondents' defamatory statements, in context, implied or asserted any provably false statements of fact was squarely presented and decided in the trial court.

Moreover, on appeal to Florida's Third District Court of Appeal, Ms. Davis presented the same argument in her briefs and at oral argument that she now presents here. Respondents acknowledge as much. Resp. Br., 17-18, 28-29. Yet, the Respondents did not move to strike any portion of Ms. Davis' appellate briefs on the ground that she had raised new factual assertions not raised in the trial court, as Respondents argue here. *Id.*, 27-30. instead, Respondents chose to brief and argue the appeal on the merits of the First Amendment issue. The Third District Court of Appeal, having received the parties' briefs and having heard oral argument, proceeded to decide the appeal on the merits of the First Amendment issue,

affirming the judgment of the trial court and citing *Milkovich*. P. App., 1. Notwithstanding Respondents' citation to Florida cases purporting to limit an appellant's right to argue issues on appeal to those raised at trial, Resp. Br., 29, the appellate court did not dismiss the appeal or raise *sua sponte* any objection to Ms. Davis' appellate argument. Clearly, the Questions Presented here were presented in the Third District Court of Appeal.

This is decidedly *not* a case where the Questions Presented by Ms. Davis were never raised in the courts below. To that extent, Respondents have cited inapposite cases. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (refusing to review district court's denial of costs under Fed. R. Civ. P. 54(d) for abuse of discretion when the question was never raised in the court of appeals); *U.S. v. Santana*, 427 U.S. 38, 41 n.2 (1976) (refusing to consider standing issue that Court raised *sua sponte* since Government did not raise the issue below); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider request to overrule *Civil Rights Cases*, 109 U.S. 3 (1883), because issue was neither raised in, nor considered by, court of appeals); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (refusing to consider question of constitutionality of state statute, which was never "raised, preserved or passed upon in the state courts below").

Rather, what Respondents object to is not that Ms. Davis has asserted a new *claim* in her Questions Presented, but that she has presented a new *argument* in support of her claim. Aside from the fact that Ms. Davis indeed raised the same argument in the Court of Appeal, this Court has expressly approved the advancement of

new arguments in support of the same claim. For example, in *Yee v. City of Escondido*, 503 U.S. ___, 112 S.Ct. 1522, 1532 (1992), this Court rejected the respondent's contention that the petitioner could not maintain a regulatory taking argument in the Supreme Court because no regulatory taking argument had been made below. *Id.* Acknowledging that it was unclear whether the petitioners had in fact raised the argument either at trial or on appeal, the Court stated nevertheless that:

> [t]he question of whether the rent control ordinance took their property without compensation, in violation of the Fifth Amendment's Takings Clause, is . . . properly before us. Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Having raised the taking claim in the state court, therefore, petitioners could have formulated any argument they liked in support of that claim here.
>
> A litigant seeking review in this Court of a claim properly raised in a lower court thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. . . . The petitioner can generally frame the question as broadly or as narrowly as he sees fit.[2]

Id. (citations omitted). Thus, under *Yee*, even if Ms. Davis had not made the same argument in the Court of Appeal that she renews here, this Court could still entertain that

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[2] This Court eventually refused to consider the regulatory taking issue, not because it had not been raised in the courts below, but because that issue was not "fairly included" in the question presented, which dealt only with physical takings. *Id.* at 1533.

argument since Ms. Davis presented the federal question below and her claim remains the same.

Moreover, this Court has never adhered to an inflexible rule that claims or issues not presented below cannot be presented to the Supreme Court, as two of the cases that Respondents cite recognize. *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (considering Government's theory presented for first time in *brief on the merits* that no unconstitutional seizure occurred); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (vacating judgment below and remanding based on Supremacy Clause challenge to Illinois statute, although petitioners previously based their claims only on Equal Protection grounds below); *see also Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (addressing constitutional issue on the merits that was not presented in the petition for certiorari, in the district court, or the court of appeals, but that had been squarely presented, fully briefed, and was an important, recurring issue). This Court need not go so far. The federal question in the instant Petition,[3] as well as Ms. Davis' claims, have been the same since this case was in the state trial court. The same argument presented in Ms. Davis' Petition was briefed and argued in the Court of Appeal immediately below. Consequently, the Questions Presented are properly before this Court.

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[3] Although respondents make much of Florida cases purportedly limiting the issues that may be raised on appeal, those cases are not dispositive as to whether the federal questions presented in the instant Petition were adequately raised below. "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969).

II. RESPONDENTS' ASSERTION THAT THE COURTS BELOW CORRECTLY APPLIED *MILKOVICH* TO INSULATE "POLITICAL NAME-CALLING" FROM STATE LIBEL LAW IS ERRONEOUS

This Court has never held that "policial name-calling" is immune *per se* under the First Amendment from the reach of state libel laws. To the contrary, simply because "speech is used for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the orderly manner in which economic, social, or political change is to be effected." *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964). Nor has this Court abandoned candidates for public office to political antagonists, leaving them completely without redress for defamatory speech. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). Hence, entry into the political arena does not require a candidate for public office to forfeit all protection from defamatory speech, even if it is somehow "political."

But under Respondents' position, defamatory speech of a colorably "political" nature is always immune from redress. In their words, "*Milkovich* reaffirms . . . that political 'name-calling,' however defamatory, is not actionable, nor are expressions which inherently invoke political judgments, as opposed to those stating or implying facts." Resp. Br., 22. Yet, *Milkovich* had nothing to do with political name-calling, nor did this Court recognize in that case a legal distinction between political "opinions" and verifiably false facts. Rather, the case stands only for the proposition that "opinions" do not constitute a category of protected speech under the First Amendment because even "opinions" may imply verifiably false facts. *Milkovich*, 497 U.S. at 18.

The Respondents' defamatory statements[4] that Ms. Davis is a "Castrista" and represents Castro's interests in the United States *did*, however, imply verifiable facts. The Respondents knew that such statements would impute to Ms. Davis well-defined political affiliations, membership in certain organizations, and beliefs in contradiction to the Cuban community in Miami. P. App., 13 (Amend. Compl., ¶¶ 19-21). As shapers of public opinion, the Respondents clearly tried closely to associate Ms. Davis with Castro, knowing that to do so would irreparably damage her reputation and standing in South Florida. The Respondents falsified and fabricated "facts" to show that Ms. Davis is an agent of Castro, such as that one of Ms. Davis' husband's clients is Castro's "most visible agent in Miami;" that another client "belongs to Castro's government;" that her husband's "law firm was chosen by the government of the tyrant Fidel Castro to defend the interests of Aruca's Marazul;" and that Ms. Davis "is a member of her husband's law firm," "a partner and wife of a lawyer trusted by Fidel Castro." Pet., 4-6. Respondents tried to give the foregoing "facts" an air of authenticity, couching their carefully chosen rhetoric in the language of objective, investigatory reportage, and implying that they culled the information from extrinsic sources. *Id.*, 12. "This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [Ms. Davis was closely linked to Castro]. Nor does the general tenor of the article negate this impression." *Milkovich*, 497 U.S. at 21.

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[4] That Respondents' publications defamed Ms. Davis has never been in dispute. *See* Pet., 14.

Contrary to Respondents' interpretation, *Milkovich* itself suggests that just this sort of publication is subject to a defamation action: "Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 497 U.S. at 18-19; *see also Moldea v. New York Times Co.*, 15 F.3d 1137, 1144 (D.C. Cir. 1994) ("[D]efamatory assessments based on incorrect 'facts' stated by the speaker are also actionable. Thus, the statement 'In my opinion Jones is a liar because he cheats on his taxes' could be libelous if the allegation of cheating were untrue."), *modified on other grounds sub nom. Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994).

Yet Respondents insist that this case is indistinguishable from "name-calling cases in which speakers, in a moment of frustration or hostility, hurled a "loose" and "figurative" epithet, such as "Nazi" or "fascist," that did not imply any actual facts about the object of derision. *See* Resp. Br. at 22-26. Respondents, for example, rely heavily on dicta in *Lasky v. American Broadcasting Cos., Inc.*, 606 F. Supp. 934, 940 (S.D.N.Y. 1985), to provide examples of non-actionable "political" epithets. Resp. Br., 22-23. In that case, two individuals were "engaged in a shouting match in which Lasky called Mundel a communist and she called him a Nazi." 606 F. Supp. at 940 (cited in Resp. Br., 23). In that context, no reasonable person would take seriously that either Lasky or Mundel had intended to prove that the other was actually a Nazi or communist. (In any event, *Lasky* did not concern tort liability for those statements. *See id.* at 940).

Lasky is similar to a line of this Court's cases which Respondents contend the trial court correctly applied to dismiss the Amended Complaint. Resp. Br., 25-26. In

those cases, this Court held non-actionable defamatory publications which, in context, could not reasonably have been interpreted as implying actual facts about the defamed party. *See Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) (reversing because "[i]t is simply impossible to believe" that a reasonable reader would have interpreted the accurate and full report of a city council meeting as charging Bresler with "blackmail"); *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 285 (1974) (reversing because "[i]t is similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with . . . treason"); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 45, 50 (1988) (reversing where ad parody "could not reasonably have been interpreted as stating actual facts about the public figure"). Surely, Respondents do not seriously contend that their publications could not reasonably be interpreted as stating actual facts about Ms. Davis. The Respondents' articles distorted, falsified, and fabricated "facts" in a deliberate effort to intimidate Ms. Davis and ignite violent reprisals against her in her campaign for federal public office. Based on the representations of "fact" that *La Verdad's* articles laid out, a reasonable reader knowing nothing about Ms. Davis could easily interpret those "facts" as indicating Ms. Davis' close association with Castro. Based on the immediate, hostile reaction that the articles engendered, many readers no doubt did interpret the defamatory statements as representations of actual facts. *Bresler, Letter Carriers,* and *Falwell* have no application this case.[5]

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[5] The Respondents also rely on *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985), to show that "political opinions" are not actionable. Resp. Br.,

In sum, *Milkovich* did not establish that "political name-calling" is not actionable under the First Amendment, nor do Respondents' other cases support that position. In the context of the articles in which they appeared, the Respondents' defamatory statements could reasonably have been, and were, interpreted as stating verifiably false facts about Ms. Davis. Moreover, the Questions Presented are properly before this Court, and the Court should grant the Petition to resolve them.

Respectfully submitted,

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24. In that case, a Marxist professor alleged that he had been defamed by an editorial that stated that he was "an outspoken proponent of political Marxism." The obvious distinction from this case, however, is that the professor was a widely known and self-professed Marxist. The court affirmed summary judgment for the defendant because "the trier of fact would have the dubious task of trying to distinguish 'political Marxism' from 'non-political Marxism,' whatever that may be." *Id.* at 987. But in doing so, the court explicitly cautioned that it was *not* holding that terms such as " 'fascist' cannot be statements of fact in any context," *id.* at 980 n.20, as Respondents apparently believe.